# (22,827)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1913.

## No. 77.

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JOSEPH SWIFT, PLAINTIFF IN ERROR,

*vs.*

DONALD A. McPHERSON.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

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* * * * * * *

1 & 2 In the Circuit Court, Eighth Judicial Circuit, within and for Lawrence County, State of South Dakota.

DONALD A. MCPHERSON, Plaintiff,

vs.

JOSEPH SWIFT and A. W. COE, Defendants.

*Complaint.*

The above named plaintiff complains of the above named defendant, and alleges:

(1) That on or about the 14th day of May 1888 this plaintiff's assignor, James K. P. Miller, and the defendant Joseph Swift executed an agreement in writing, of which the following is a correct copy, and mutually signed and delivered the same, to wit:

This contract between Joseph Swift of Essex County, State of New Jersey, party of the first part, and James K. P. Miller of Deadwood, Lawrence County, Dakota, party of the second part, witnesseth:

That Whereas, the said party of the second part has purchased for the said party of the first part, and for joint account, the property situated in the City of Deadwood, Lawrence County, D. T., known as the Hawke Mineral Claim, comprising U. S. Mineral Claims numbered forty-five and fifty-three excepting certain portions not deeded to said Swift as shown from his deed from Vehmeyer on record at Register of Deeds' office, Lawrence County, D. T.

And in consideration of the said party of the second part looking after said property, collecting the rents, attending to all the necessary repairs, paying taxes, insurance, etc., the said party of the first part agrees that the said party of the second part shall receive for said services one-half of all the net profits from said property, first deducting from said property eight (8%) per cent. per annum interest on the Eighteen Thousand Five Hundred Dollars ($18,500.00) paid therefor. The said party of the second part to remit to the said party of the first part, monthly, or as fast as collected, the said interest and his half of the profits; and furthermore, in consideration of the said party of the second part agreeing to pay

3 to the said party of the first part one-half of any ultimate loss that may occur on said purchase price of Eighteen Thousand Five Hundred ($18,500.00) Dollars the said party of the first part agrees that the said party of the second part shall receive one-half of the profits ultimately accruing from the sale of said property above the purchase price of Eighteen Thousand Five Hundred ($18,500.00) Dollars.

The said party of the second part agrees that in case there be no income on the investment, owing to the property lying vacant of tenants at any time, to settle with and remit to the said party of the

first part at least once each six (6) months eight per cent. interest on one-half of the said purchase price of Eighteen Thousand Five Hundred ($18,500.00) Dollars.

Each party hereto pays in cash when due one-half of all costs upon said property, for taxes, insurance, repairs or other necessary expenses.

All money realized from sales of any part of said property shall be remitted to said party of the first part and credited upon said sum of Eighteen Thousand Five Hundred ($18,500.00) Dollars purchase money, in liquidation thereof and stopping the eight per cent. interest to extent of such credits.

Additional investments for improvements subject to same conditions.

New York, May 14th, 1888.

JOSEPH SWIFT.
JAMES K. P. MILLER.

Witnesses:
GEORGE P. JOHNSON.
D. SCOTT.

(2) That thereafter, the said James K. P. Miller, one of the parties who executed the foregoing agreement, died, to-wit: on or about the 12th day of January 1891, having property within Lawrence County, South Dakota. That subsequent thereto, and on May 23rd, 1892, William Selbie of Deadwood, South Dakota, was duly appointed administrator with will annexed of the estate of said James K. P. Miller by the County Court of Lawrence County, South Dakota, which order so appointing him was duly given and made by the said County Court; That thereafter on June 1st, 1892, said William Selbie filed with the County Court the bonds re-
4 quired by its order of appointment with sufficient sureties duly approved, and thereupon letters with will annexed were duly issued by the said Court to the said William Selbie, and he entered upon the discharge of his duties as such administrator, and that the said letters have not been revoked. And the said William Selbie by his appointment as administrator with will annexed as aforesaid, became and was vested, and charged with all the interest which the said Miller had in the contract hereinbefore set forth and in the property therein described.

(3) Your complainant further alleges that at the time of the death of the said James K. P. Miller he owed divers and sundry debts and liabilities amounting in the aggregate to more than $100,000 and at the time of the appointment of the said William Selbie as administrator with will annexed as aforesaid the estate of said James K. P. Miller was insolvent and owing debts to an amount exceeding $100,000, a large portion of which still remains unpaid, and it became and was necessary at the times hereinafter stated to sell the real property belonging to the estate of the said Miller, including the property described in the foregoing agreement in order to pay such debts owing by said estate.

(4) That thereafter, to wit: on September 29th, 1892, the County Court of Lawrence County, South Dakota, made and entered an

order for the sale of certain property belonging to the estate of said James K. P. Miller, including the property described in the agreement hereinbefore set forth, which said order was duly given and made; That under and by virtue of said order of sale the said, William Selbie as administrator with will annexed of the said estate, did duly sell, assign and transfer unto this plaintiff all the right, title and interest of the said estate in and to said contract hereinbefore set forth, and in and to the premises therein described and did on January 11th, 1893, by deed duly executed acknowledged and delivered transfer and convey unto this plaintiff all the interest of said estate in and to said contract and premises therein described and that the plaintiff is the owner thereof; That said sale was duly confirmed by said County Court on or about the
5 29th day of December 1892; That the consideration paid by the said complainant Donald A. McPherson to the said William Selbie, administrator aforesaid, for the sale and purchase of said contract, and of the interest of said Miller Estate in said contract and premises therein described was the sum of Five Thousand and Five ($5,005.00) Dollars.

(5) Your complainant further alleges upon information and belief that said James K. P. Miller performed all the conditions of said contract or agreement upon his part; That the said property was in fact purchased by the said James K. P. Miller the said defendant, Joseph Swift, advancing and furnishing the money with which to pay for the said property.

(6) That a portion of said property was and is occupied and improved real estate in the City of Deadwood, and a portion thereof has been since the time said agreement was made, and is now unoccupied and unimproved real estate in said city.

(7) That the said defendants since the death of the said Miller have been collecting all the rents, issues and income from said property; That the said defendant, A. W. Coe, has been acting as the agent of the said defendant Joseph Swift, and has been collecting the said rents, issues and income, and charging a certain commission for such services, and has been remitting the balance of such rents and income to the said defendant Joseph Swift, who is not a resident of the State of South Dakota; and that said defendant Joseph Swift has been wrongfully and unlawfully applying and appropriating said rents, issues and income from said property to his own use. That upon the purchase of the property described in said agreement the title thereto was taken from the original owners in the name of the said defendant, Joseph Swift, in accordance with the said agreement hereinbefore set forth, for the joint interest and benefit of the said James K. P. Miller and said Joseph Swift. That the said Joseph Swift took and held the title to an undivided one-half interest in said property as trustee for the said James K. P. Miller, and now holds the title to said undivided one-half interest in said property for this said plaintiff as the successor in interest of the said James K. P. Miller.

6 (8) Plaintiff further alleges that he is not advised as to the exact amount of taxes, insurance, necessary repairs and

other expenses and expenditures which have been made or expended upon said property, nor as to the exact amount of incomes, issues and rents which have been collected and received by said defendants therefrom; but plaintiff alleges upon information and belief that the rents, incomes and issues from said premises which have been collected and received by the said defendant Joseph Swift, have been more than sufficient to pay all the repairs, taxes, insurance and other expenses properly chargeable against said premises under the terms of said agreement, together with the full sum of Eighteen Thousand Five Hundred ($18,500.00) Dollars, the original purchase price of said premises, and interest thereon as provided for by the terms of said agreement. That a portion of the income derived from said premises was received from the sale of certain portions thereof, but plaintiff is not advised as to the exact description of such portion of said premises as have been sold by said defendant Joseph Swift, nor as to the exact amount received from such sales, but plaintiff alleges upon information and belief that the moneys received from the sale of such portions of said premises as have been sold by the said defendant, Joseph Swift, together with the moneys received as rents and issues from said premises have been more than sufficient to repay the said defendant, Joseph Swift, the said sum of Eighteen Thousand Five Hundred ($18,500.00) Dollars, with interest thereon as provided for by the terms of said agreement, together with all repairs, taxes, insurance and other proper and legitimate expenses properly chargeable against said premises of the said James K. P. Miller before the said plaintiff as his successor. Upon information and belief that there is a balance now in the hands of the said defendant Joseph Swift, properly due and owing to this plaintiff, and for which the said defendant has not accounted, and which he refuses to account for to the said plaintiff.

(9) Plaintiff alleges that he is the absolute owner and entitled to the possession of an undivided one-half interest of such
7 portions of said premises described and referred to in said agreement, and hereinbefore described, as have not been sold by the said defendant Joseph Swift, and that plaintiff is entitled to one-half of all the moneys collected and received by the said defendant Joseph Swift from the sale of any portions of said premises which have been sold, and which have been received and collected as rents or issues of said premises, less such proper and legitimate expenditures in the way of repairs, taxes, insurance or interest as may have been properly and legally made under the terms of said contract.

(10) Your complainant further alleges that on the 22nd day of July 1892. this plaintiff's assignor, through William Selbie, administrator with will annexed of said estate, caused to be given the said Joseph Swift a Notice in writing, which was in the words and figures following, to wit: Excepting the description of the property which is not herein inserted, but which notice included the property described in the agreement hereinbefore set forth.

DEADWOOD, S. D., *July 22nd*, 1892.

To Joseph Swift, Wilmington, Delaware.

Please take notice: That on the 1st day of June 1892, the undersigned, William Selbie of Deadwood, Lawrence County, South Dakota, was by the County Court of Lawrence County, duly appointed administrator of the estate of James K. P. Miller, deceased, late of the City of Deadwood, Lawrence County, South Dakota. The undersigned is informed that the said James K. P. Miller at the time of his death was possessed of, and since his decease his estate is possessed of certain valuable property interest in the following described real property, concerning which certain contracts and agreements were made between yourself and the said James K. P. Miller, to wit: (Here property was described).

You will please take further notice that as administrator and representative of the said estate the undersigned offers to look after said property, collect the rents, attend to all necessary repairs, the payment of taxes, insurance, &c., as fully and completely as the said
8 James K. P. Miller might do were he alive; and further, that as administrator and representative of the said estate the undersigned stands ready to fulfill any and all obligations made on behalf of the said James K. P. Miller in relation to said property or his interest therein. If you will notify your agent here to turn over said property to me I will take charge thereof and look after the said property for the best interests of all concerned, and account for all rents and revenues derived from said property in accordance with the terms of the contract or agreement made with you by Mr. Miller.

I suggest, further, that if you desire to purchase the interest of Mr. Miller or of the estate in the said property, or any portion thereof, that, as administrator, I am willing to negotiate for a sale to you of such interest upon a fair valuation under the proper direction of the County Court.

Very respectfully,

WILLIAM SELBIE,
*Administrator of the Estate of*
*James K. P. Miller, Deceased.*

(11) That prior to the commencement of this action the plaintiff duly demanded of the said defendant Joseph Swift that he convey to said plaintiff an undivided one-half interest in and to such portions of said property as had not theretofore, prior to such demand, been sold and conveyed by the said defendant Joseph Swift, and demanded that the said defendant account to said plaintiff for the moneys received by the said defendant by reason of the sale of such portions of said premises referred to in said contract as had been sold by said defendant, and for such moneys as had been received by said defendants as rents, incomes, issues or profits of said premises. That said defendant refused and still refuses either to account to said plaintiff for any of said moneys so as aforesaid received by him, and refused, and still refuses, to transfer or convey

to the said plaintiff such an undivided one-half interest in and to such of said premises as have not been sold by the said defendant, and refused to transfer or convey to said plaintiff any interest whatever in any of said property.

9 (12) That the said defendant, A. W. Coe, is still collecting the rents from said premises, and charging a commission for such services, and remitting the balance to the said defendant Joseph Swift, and said defendant A. W. Coe, threatens to continue collecting such rents and remitting the same to said defendant Joseph Swift. That prior to the commencement of this action the plaintiff duly demanded of the said defendant A. W. Coe one-half of the said rents collected by him from said premises and as rents and issues thereof, less the commissions of the said defendant Coe, but that said defendant refused and still refuses to pay any of said rents, incomes or issues to this plaintiff or any part thereof; and that said defendants Joseph Swift and A. W. Coe have refused and still refuse to recognize the ownership of this plaintiff in and to any of said premises or in and to any of said rents, issues or incomes therefrom; and said defendants refuse to permit plaintiff to collect or receive any of said rents. That said defendant Joseph Swift claims to be the absolute owner of said premises and claims and asserts the right to sell all or any portion thereof as the absolute individual property of the said defendant, Joseph Swift. That the claim of the said defendant, Joseph Swift, is without foundation in fact or law, and casts a cloud upon the title of the said plaintiff and prevents the said plaintiff from the full use and disposition of his interest therein.

Wherefore plaintiffs prays judgment:

(1) That an accounting be had between the plaintiff and the said defendants, and that the said defendant Joseph Swift be adjudged to pay to the said plaintiff such sum as may upon such accounting be found to be due from said defendant Joseph Swift to the said plaintiff.

(2) That plaintiff be adjudged to be the owner of an undivided one-half interest in and to such portions of the said property hereinbefore referred to and described in said agreement as may not prior to the commencement of this action have been lawfully sold by the said defendant Joseph Swift.

10–12 (3) That title of said plaintiff in and to such an undivided one-half interest in and to said property be quieted and confirmed in said plaintiff, and that defendants be perpetually restrained and enjoined from claiming any right, title or interest therein.

(4) That the said property be partitioned by decree of this Court, or in event that the same cannot be partitioned without injury to such property or to the said plaintiff and the defendant Joseph Swift, that the entire property now remaining be sold under the order of this Court, and according to its practice, and that the proceeds arising from such sale be divided between the said plaintiff and the said defendant Joseph Swift.

(5) That the said defendant A. W. Coe pending this action be

enjoined and restrained from turning over or remitting to the said defendant Swift the one-half of the rents, profits and incomes from the said premises belonging to this plaintiff; and that said defendant A. W. Coe be adjudged at the trial of this cause to pay over to plaintiff one-half of said rents, incomes and profits which may prior to the commencement of this action have been collected or received by him and not remitted or delivered to the defendant Swift, and one-half of such said incomes, rents and profits which may be received or collected by the said defendant Coe subsequent to the commencement of this action.

(6) That plaintiff have such other and further relief in the premises as may to the Court seem equitable and just.

MARTIN & MASON,
MOODY, KELLAR & MOODY,
*Attorneys for Plaintiff.*

STATE OF SOUTH DAKOTA,
*County of Lawrence, ss:*

Donald A. McPherson being first duly sworn upon his oath states: That he is the plaintiff in the above entitled action; That he has read the foregoing complaint and knows the contents thereof, and that the statements therein contained are true except as to matters therein stated on information and belief and as to those matters he believes them to be true.

DONALD A. McPHERSON.

Subscribed and sworn to before me this 17th day of June A. D. 1901.

[SEAL.] CLAYTON T. FOWLER,
*Notary Public.*

* * * * * * *

18 In the Circuit Court of the Eighth Judicial Circuit of the State of South Dakota in and for Lawrence County.

*Answer of Defendant Swift.*

DONALD A. McPHERSON, Plaintiff,
vs.
JOSEPH SWIFT et al., Defendants.

The defendant Joseph Swift for his separate answer to the complaint of the plaintiff in the above entitled action, says:

1. He admits that an instrument in writing of the character referred to in paragraph 1 of said complaint as an agreement, was on or about the fourteenth (14th) day of May 1888, signed by James K. P. Miller and himself under the circumstances and upon the representations hereinafter set forth, and he believes that said so called agreement was of and to the purport and effect set forth as a copy in said paragraph 1; but for greater certainty he begs to refer to the original when produced in this court.

2. He admits that James K. P. Miller one of the parties to the said so called agreement, died on or about the 12th day of January 1891, having property within Lawrence County, South Dakota. But he denies that he has any knowledge or information sufficient to form a belief, or to whether on May 23, 1892, or at any other time, William Selbie was duly or otherwise appointed administrator with the will annexed, of the said James K. P. Miller's estate by the County Court of Lawrence County or any other tribunal; or whether an order so appointing him was duly or otherwise given or made by said County Court on June 1, 1892, or at any other time said Selbie filed with the County Court a bond as alleged, with sureties duly or otherwise approved; or whether thereupon, or at any time, letters with the will annexed or otherwise were duly or otherwise issued by said Court to said Selbie; or whether he entered upon the discharge of any duties as such administrator, or whether such letters if any issued have not been revoked. But were such averments true, and the said William Selbie appointed and qualified as administrator with the will annexed as alleged, yet nevertheless this defendant denies that said Selbie became or was vested or charged in any manner with all or any interest which the said James K. P.
14 Miller had (if any) in the so-called contract of May 14, 1888, in the complaint referred to, or any interest whatever in the property therein described; and this defendant alleges the fact to be, that if the said James K. P. Miller ever had any interest in law or in fact in the said so-called contract, or in the real property therein described, (which is not admitted but now expressly denied), yet nevertheless whatsoever interest he might or may have had, passed by his will, duly executed on the 22nd day of November, 1890, and duly approved and admitted to probate by the County Court in and for Lawrence County, South Dakota, on the 24th day of February 1891, whereby and by the terms whereof, he devised and bequeathed to his friends and business associates, Joseph Swift of Wilmington, Delaware, E. B. Beecher, of Westville, Connecticut, and William H. Swift, of Wilmington, Delaware, or to the survivors of them, all his property real and personal, wherever situated, of which he might die seized and possessed, in trust, for the uses and purposes in said will set forth.

3. This defendant admits that at the time of the death of said James K. P. Miller he owed divers and sundry debts and liabilities, possibly amounting in the aggregate to more than $100,000, as alleged in the complaint, and further admits that on the 23d day of May 1892, when it is alleged, that William Selbie was appointed as administrator with the will annexed of such estate, the estate of James K. P. Miller was insolvent and owing debts to an amount probably exceeding $100,000, but as to what portion thereof remains unpaid this defendant denies that he has any knowledge or information sufficient to form a belief. He also denies that he has any knowledge or information sufficient to form a belief as to whether it became or was necessary at the time stated in the complaint or at any time to sell the real property belonging to the estate of said Miller or any part thereof, in order to pay such debts owing by said

Miller's estate; and expressly denies that it became or was necessary, or that said William Selbie had the power or authority as administrator or otherwise, to sell the property described in the so-called agreement of May 14, 1888, set forth in the complaint, or any part thereof.

15 4. This defendant admits that he has been informed that the County Court of Lawrence County attempted on or about September 29, 1892, to make an order for the sale of real property belonging to the estate of James K. P. Miller deceased, but he has been informed and believes and upon such information and belief alleges the fact to be, that such order was wholly without jurisdiction and was not duly given or made, and did not include the property described in the so called agreement, in the complaint referred to, and alleged to be set forth, or any part thereof. This defendant further admits that the said William Selbie undertook, under such alleged order of sale to sell the interest of the Miller estate in and to such so-called contract and in and to the premises therein described; but he is informed and believes and upon such information and belief, alleges the fact to be that such sale was wholly without jurisdiction, was not legally conducted or had, and that said Selbie did not, under or by virtue thereof, duly or legally in any manner, sell or assign any interest in such alleged contract or the premises therein described; and this defendant expressly denies that the said estate had any interest in such so-called contract or in the premises therein described as was the subject of sale by said William Selbie or any other party whomsoever. This defendant admits that on or about January 11, 1893, the said William Selbie purports to have executed and delivered a deed for the purpose of transferring and conveying to plaintiff the alleged interest of the said estate in said so-called contract, and the premises therein descrcibed; but he is advised, informed and believes, and upon such information and belief so charges the fact to be, that said Selbie was wholly without authority to make, execute or deliver such deed and that the same carried with it no interest whatever to the plaintiff and is wholly void and of no effect, and that plaintiff is not by virtue thereof or of any proceedings whatever, the owner of the premises in said so-called agreement described or of any part or portion thereof or of any proceedings whatever, the owner of the premises or about the 29th day of December, 1892, the County Court made an order attempting to confirm such sale so alleged to have been

16 made by said Selbie; but he denies that the same was duly or legally made. And this defendant is advised, informed and believes, and upon such information and belief so alleges the fact to be, that such order was improperly and improvidently made, and that the Court was wholly without jurisdiction to make or enter the same. This defendant admits that he has been informed that the plaintiff claims to have paid to said William Selbie on such alleged purchase and sale the sum of $5005.00, but he is informed and verily believes and upon such information and belief charges the fact to be, that his said claim is unfounded, and that he has not paid the sum of $5005.00 or any sum whatever. This

defendant is further advised, informed and believes, and upon such information and belief so charges the fact to be, that not only were the acts of said William Selbie in the premises, as alleged administrator with the will annexed, and of the said County Court, wholly without jurisdiction and void, yet nevertheless had they been lawful and authorized, and had there been any interest in said estate in or to said so-called contract of May 14, 1888, which was the subject of sale by order of the County Court, that the said William Selbie for himself and for the Merchants National Bank of which he was the cashier and manager in liquidation, was directly interested in the so-called sale of the so-called interest of the Miller estate in the so-called contract of May 14, 1888, and the premises therein described, and that he was co-operating with the said Donald A. McPherson in the attempted purchase of the so-called interest of said Miller estate in said so-called contract and the premises therein described, to the wrong and injury of the creditors of said estate, and that by reason of his said interest therein, and his conduct in the premises said attempted and alleged sale was wholly void. This defendant is further advised, informed and believes, and upon such information and belief so charges the fact to be, that counsel appeared specially for him in the County Court on the 29th day of December, 1892, and then and there, without admitting the jurisdiction of the Court, objected and excepted to its jurisdiction therein and to the so-called report of sale and to the Court's attempted con-
17 firmation of said alleged sale to Donald A. McPherson; and that said counsel then and there offered to prove and did prove, without admitting the authority of the said William Selbie to make such alleged sale or of the County Court to confirm the same, that nevertheless the said William Selbie was directly interested therein, and upon being overruled by the County Court, duy excepted — its rulings and orders in the premises. Whereby and by reason whereof, even if all the proceedings has been legally and properly had, and the Miller estate had had any interest in or to said so-called contract of May 14, 1888, yet nevertheless the plaintiff herein would be without such title as could now be pleaded or enforced in this Court, and these facts are therefore pleaded in bar of the plaintiff's right further to have or maintain his action herein.

5. This defendant denies that said James K. P. Miller performed all or any of the conditions of said so-called contract or agreement upon his part, except that he collected some money on account of rent and attended to the payment of some taxes and payment for repairs and insurance therefrom or from funds of this defendant otherwise coming into his hands. And this defendant expressly denies that said Miller remitted or paid to this defendant or to any one for him, at least once each six months or at any time, eight per cent interest or any other interest whatever on one half of $18,500.00, except in so far as the small balance at times on account of rents collected over and above taxes, etc., paid, may have constituted a contribution toward such interest; but the rents fell short of paying interest, and Miller paid no balance over to this defendant. This

defendant further expressly denies that said real property described in said so-called agreement was in fact or otherwise purchased by said James K. P. Miller, but alleges the fact to be that said property was purchased by this defendant, for him, and with his money, from one Christian H. Vehmeyer, under the circumstances and upon the considerations hereinafter set forth.

6. This defendant admits that a portion of said property was and is occupied and improved real estate in the City of Deadwood; and that a portion thereof has been since the time said so-called agreement was made and is now unoccupied and unimproved
18 real estate in said city.

7. This defendant admits that since the death of said Miller he has been, through his agents upon the ground, collecting all the rents, issues and income from said property, and applying the same to his own use, and he denies that such application was either wrongful or unlawful. He admits that A. W. Coe, for a time as partner with J. F. Edmonds, and since by himself, has been acting as his agent, in collecting the said rents, issues and income, and after charging a commission for his services, remitting the balance to this defendant, who is not a resident of South Dakota. This defendant admits that upon the purchase of the property the title thereto was taken from the original owner, Christian H. Vehmeyer, in the name of this defendant; but he denies that it was so taken in accordance with the said so-called agreement, or for the joint interest or benefit of James K. P. Miller and this defendant, and alleges the fact to be that the deed for said property from Christian H. Vehmeyer to this defendant was made, executed and delivered on or about the 8th day of May, 1888, and before the said so-called agreement was made or entered into. This defendant denies that he has at any time held or now holds an undivided one-half interest in said real property as trustee or otherwise for said James K. P. Miller, or for the plaintiff in this action as his successor or otherwise.

8. This defendant denies that the rents, incomes and issues from said premises which have been collected and received by him have been more than sufficient or at all sufficient to pay all of the repairs, taxes, insurance and other expenses properly chargeable against said premises together with the full sum of $18,500.00, the original purchase price of said premises, and interest thereon, whether as provided for by the terms of said so-called agreement or otherwise. This defendant admits that a portion of the income derived from said premises was received from the sale of certain portions thereof, to-wit, largely from sales made recently and long after plaintiff had abandoned and renounced all claim whatever to the property, and his former action of like tenor and effect to this, (as here-
19 inafter more fully set forth) had been upon his application dismissed be decree of court; but this defendant denies that the moneys received from the sale of such portions of said premises as have been sold by this defendant together with the moneys received as rents and issues from said premises have been more than sufficient or have been at all sufficient to repay this defendant the said sum of $18,500.00 with interest thereon, whether as provided

for by the terms of said so-called agreement or otherwise, together with all repairs, taxes, insurance and other proper and legitimate expenses properly chargeable against said premises,—being the premises of this defendant, and not, as alleged in the complaint, "premises of the said James K. P. Miller before the said plaintiff as his successor." And this defendant denies that there is a balance now in his hands, either properly or otherwise due or owing to plaintiff, and for which this defendant has not accounted or which he refuses to account for to said plaintiff. And this defendant alleges, that on the occasion of plaintiff's former action as aforesaid, this defendant set out his account, and offered to accept plaintiff as a partner upon the basis of his (plaintiff's) construction of said so-called agreement and the tender then made by him and the accounting proposed in his complaint; but that after more than two years' deliberation he declined this defendant's offer, withdrew his tender, abandoned and renounced his claim, and assented to a judgment and decree dismissing his action.

9. This defendant denies that plaintiff is the owner either absolute or otherwise, or entitled to the possession of an undivided one-half interest or of any interest whatever of such portions of said premises described and referred to in said so-called agreement as have not been sold by this defendant; and denies that plaintiff is entitled to one-half or any part whatever of the moneys collected and received by this defendant from the sale of any portions of said premises which have been sold, or to one-half or any part whatever of the moneys which have been received and collected as rents or issues of said premises.

10. This defendant admits that he received from some one a notice of the character set forth and made a part of paragraph 10 of plaintiff's complaint; but as after the death of James K. P. Miller this defendant had employed other persons who were entirely satisfactory, to look after his properties, collect rents, attend to repairs, pay taxes, insurance, etc., and as he was in no need of further assistance in that regard, he made no reply to the said notice or offer.

11. This defendant admits that prior to the commencement of this action to-wit on or about May 20, 1893, and before the commencement of plaintiff's former action, said plaintiff demanded of this defendant that he convey an undivided one-half interest in and to such portions of said property as had not theretofore prior to such demand been sold and conveyed by this defendant; and this defendant admits that in said plaintiff's former action begun about the same date and in his complaint therein he made a like demand, and also demanded that this defendant account for moneys received by reason of sales made or from rents, incomes, issues or profits of said premises. This defendant admits that he refused and still refuses to account to said plaintiff for any of said moneys so as aforesaid received by him, and refused and still refuses to transfer or convey to plaintiff such undivided one-half interest so demanded by plaintiff or any interest whatever in any of said property.

12. This defendant admits that A. W. Coe is still collecting the rents from said premises and charging a commission for such services and remitting the balance to this defendant, and he believes that said A. W. Coe will continue so to do. And if any demand has been made by plaintiff of said Coe for one-half or any part of said rents so collected by him this defendant is well satisfied that Coe as his agent would decline to comply with such demand. This defendant admits that he has refused and still refuses to recognize any claim of ownership by or on behalf of the plaintiff in or to any of said premises or in or to any of the rents, issues or incomes therefrom, and that he would refuse to permit plaintiff to collect or receive any of said rents. This defendant admits that he claims to be the absolute owner of said premises, and claims and asserts the right to sell all or any portion thereof as his absolute individual property;
but denies that his said claim is without foundation in fact
21 or law and denies that plaintiff has any title whatever or any interest therein of which he could make any use or disposition, upon which this defendant's claim could cast any cloud.

13. And if there be any allegation or statement in plaintiff's complaint omitted to be answered by this defendant herein, as to each and every such allegation and statement, this defendant denies that he has any knowledge or information sufficient to form a belief.

14. This defendant for a further answer and defense to this action says: that said so-called contract and agreement of May 14th, 1888, was wholly without consideration, and was procured from this defendant upon and by means of sundry misrepresentations on the part of James K. P. Miller, as hereinafter more fully set forth, and which only came to this defendant's knowledge about the year 1894, and after plaintiff had begun his former action; and that said so-called contract was and is wholly void. But that if the same should have been based upon sufficient consideration, or should be held now to be a valid agreement, yet nevertheless, it was made and entered into after this defendant had purchased and paid for the property in the instrument described, and was the owner thereof and in possession thereof, and that said so-called contract was merely one of personal employment and subject to be revoked at this defendant's pleasure, or at the pleasure of James K. P. Miller, and was revoked by his death; that said so-called contract conferred and was only intended to confer upon said Miller an agency for the purpose named and specified therein, and conferred upon him no interest whatever in the property, and no power to be exercised in relation thereto or for the sale or disposition thereof or of any part thereof, and that said Miller had no interest therein, or any interest that would pass to his heirs or representatives, or that could be assigned or transferred to any one whomsoever; but that his employment as this defendant's agent to the limited extent and for the particular purposes specified in said instrument, ceased and terminated at his death on the 12th day of January, 1891, and that at all times since said date, this defendant's agent and agents have been persons wholly and solely ac-

countable to him, and have rendered their accounts to him regarding said property, and the care and management thereof, the
22 revenues therefrom, and the expenses incident thereto.

15. This defendant for a further answer and defense to this action says: Said so-called contract or agreement of May 14th, 1888, purporting to be set forth by copy in paragraph 1 of the complaint, was wholly without consideration, and was obtained from this defendant by the deceased James K. P. Miller by means of misrepresentations on his part and the suppression by him of certain material facts, as follows: The said Miller positively asserted and represented to this defendant at divers times about and before May 14, 1888, and before the signing of said so-called contract of that date, that he was a man of large means and property, amply solvent and responsible for all obligations he might assume, and this defendant then believed such representations and that said Miller would be able to meet the obligations proposed to be imposed on him in said instrument of May 14, 1888; that he made such positive assertion in a manner, as this defendant verily believes, not warranted by the facts, and for the express purpose of leading and inducing this defendant to sign such instrument; whereas, in truth and in fact, at that time, as this defendant has since learned, said Miller was insolvent and wholly unable to pay his liabilities as they matured, and his property was wholly unequal to meeting or discharging his obligations. Whether said Miller believed as he asserted or not, this defendant can not say, but his representations to the effect aforesaid and this defendant's reliance thereon, was the inducing cause leading this defendant into signing said so-called contract; and said Miller in making such statements and representations, asserted that which was not true, and in a manner as this defendant believes, not warranted by said Miller's personal knowledge and information of his financial condition and the values of his property. And further, the said Miller stated and represented to this defendant, that this defendant was purchasing said property for the price of $18,500.00, and paying that amount therefor, and that it could not be bought for less, and that he was negotiating the purchase as this defendant's personal friend and representative upon that basis and for that amount, and wholly without commission or charge to this defendant; whereas, this defendant was afterward informed (to-wit about the year 1894 and after
23 the bringing of plaintiff's former action) and verily believes, and upon his information and belief alleges the fact to be, that said Miller while pretending to be the agent and representative of this defendant was acting as the agent and representative of Christian H. Vehmeyer, the seller of the property, upon an understanding and agreement with him that $15,000.00 should be the net selling price of said property for said Vehmeyer, and that the difference of $3,500.00 should be used by Miller in quieting certain claims and possessory liens upon and against the property, and the balance be divided between them, and that after settling said claims and liens for about the sum of $2,000.00, there was divided equally between said Miller and said Vehmeyer the sum of $1,500.00 out of

and from the sum of $18,500.00, paid by this defendant for said property. All of which, said Miller suppressed and withheld from this defendant, and thereby said Miller made a commission or profit of $750.00 on the sale of said property to this defendant, wholly without this defendant's knowledge or consent. And had this defendant known the truth as to said Miller's insolvency, or the truth as to his being the agent of Vehmeyer and getting a part of the money paid by this defendant as a charge or commission, this defendant would not have signed said so-called contract of May 14, 1888, or any instrument of such tenor or effect; but, relying upon the truth of his representations aforesaid, and desiring to reward him with employment because of his alleged service without compensation in the negotiations for the purchase of the property aforesaid, and imposing confidence in his integrity and fidelity to this defendant, and by reason thereof only, this defendant was induced to make said Miller his trusted agent and employé, as in said instrument of May 14, 1888, set forth. And this defendant now alleges, that by reason of the foregoing, and the untrue statements made by said Miller as to his solvency, and by his acting as an agent for said Vehmeyer adversely to this defendant's interest, and by his suppression of that fact from this defendant, he practiced a fraud and deception upon this defendant, and that said so-called contract of May 14, 1888, induced by such means to be signed by this defendant, was wholly void and of none effect.

24 16. This defendant for a further answer and defense alleges: That heretofore, to-wit, on the 18th day of May, 1893, the plaintiff in this action, Donald A. McPherson, began an action in the circuit court of the Eighth Judicial circuit of the State of South Dakota, in and for Lawrence county, against this defendant, Joseph Swift, upon the same identical instrument of May 14, 1888, set out in the complaint in this action, and the same identical proceedings alleged to have been had in county court, and for the same cause of action now in plaintiff's complaint pleaded and set forth; that said action was begun by the issuance of a summons in due form of law, which was thereupon served upon this defendant. That thereafter and within the time allowed by law, this defendant duly appeared by attorney in said action, who demanded the service of a copy of the complaint in the action, and that in response to such demand a copy of said complaint was on or about June 17, 1893, duly served on this defendant's said attorney; that said complaint was of very like and similar form, tenor and effect to the complaint in this action, except that plaintiff in said former complaint alleged and set out an offer and tender in writing of $9,250.00, stated in the 6th paragraph in said complaint to have been served upon this defendant on May 20, 1893, at the time of the demand from the defendant for a deed for one-half of said property, and also alleged that such sum so tendered had been deposited in bank in accordance with law and was being kept good, and the plaintiff also offered in said complaint to pay defendant one-half of all the taxes or other expenditures made by defendant upon said property, not already

paid to him from the income thereof, and plaintiff offered to bring into court the money so offered, and also the $9,250.00 so alleged to have been deposited in bank; and except also that plaintiff alleged in his said complaint that there had been good demand and
25 opportunities to sell the said property and that it could have been sold by this defendant for its full value at almost any time since the death of said Miller, and that it could then (the date of bringing the action) be so sold for its full value, to-wit, for a price largely in excess of the purchase price of said property, to-wit, $18,500.00, but that defendant neglected to sell or dispose of said property or to account for the same or the rents and income thereof or any portion thereof, and that said plaintiff further in his said complaint, to-wit, in the 17th paragraph thereof, set out at some length certain proceedings alleged to have been had in the county court of Lawrence county touching the citation of the executors of the last will and testament of said Miller before said court, their answer to such citation, and the order of the court thereon. That afterward, and within the time allowed by law, upon the application of this defendant, such proceedings were had in said action in said court that the same with a copy of the record therein was removed into the Circuit Court of the United States for the District of South Dakota, Western Division, and the said cause was there duly entered in accordance with law and the practice of said court. That thereafter, to-wit, on July 6, 1893, plaintiff by his counsel asked and obtained an extension of time in which to amend his complaint in said court, and afterwards, on August 11, 1893, duly served upon this defendant's counsel and filed such amended bill of complaint, which was simply an expansion of plaintiff's former complaint, alleging residence of the parties and other matters to conform to the federal practice, and renumbering some of the paragraphs so that paragraphs 6 and 7 herein before referred to became ninth and tenth in said amended bill of complaint, and otherwise it was of like and similar form to his original complaint, and was again of very like and similar form, tenor and effect to the complaint
26 in this action, and was substantially the same, except as before stated in containing the allegation of tender and offer of $9,250.00 and of one-half the taxes, and of opportunities to sell the property, and the reference to and extracts from county court proceedings, omitted from the present complaint. That thereafter this defendant by his solicitors demurred to said amended bill of complaint, and in due course of procedure said demurrer came on to be heard before Hon. A. J. Edgerton, judge, sitting and holding said circuit court in and for said district of South Dakota, at Deadwood in said Western Division, and after hearing and consideration said demurrer was by said judge, on or about the 10th day of May, 1894, overruled, with leave to defendant to answer. That thereafter, and in pursuance of such leave, this defendant, on July 13, 1894, answered said plaintiff's amended bill of complaint, at length and explicitly, and substantially as of the form, tenor and effect of this answer prior to and preceding this paragraph and portion thereof, except as the omissions of matter contained in said former amended

bill of complaint have led to the ommissions from this answer of the paragraphs responding thereto; and such answer of this defendant was, on or about July 13, 1894, served on plaintiff's solicitors and filed in said court. That on August 6, 1894, plaintiff filed his replication to said answer, and said cause was then fully at issue. That after said replication had been served and filed, two terms of said United States Circuit Court, to-wit, the September, 1894, term and the February, 1895, term, passed without said plaintiff McPherson's taking any further steps in his said action and suit, either in the way of taking testimony or otherwise; and this defendant thereupon, anxious to make an end of litigation and avoid further strife, notified said plaintiff that he would accept the tender of $9,250.00
27 and one-half the taxes paid and other conditions in his offer made, and in his amended bill of complaint pleaded and set forth, and would accept his as a partner and joint owner upon the basis of his tender and offer aforesaid and the terms of his said amended bill of complaint.

That the tender and offer of said McPherson so referred to was contained in an instrument of writing of date May 20, 1893, addressed to this defendant and delivered to him at about that date, and was signed by Donald A. McPherson, by G. C. Moody, his agent and attorney, and after asserting that said McPherson had become the beneficiary and purchaser of the contract of May 14, 1888, between this defendant and J. K. P. Miller, relating to the Hawke Mineral Claims, comprising U. S. Mineral claims numbered forty-five and fifty-three, excepting certain portions not deeded to Swift, etc., stated as follows. "I hereby tender you the sum of nine thousand two hundred and fifty dollars, in lawful money of the United States, which is the sum apparently due by said McPherson upon said contract in order to entitle him to the full benefit thereof, and at the same time, further on behalf of said McPherson, do request and demand you to execute to him the conveyance for an undivided one-half of said property which I now hand you." That the said tender and offer was duly pleaded and set out by copy of the instrument in said plaintiff's original complaint, and also in his said amended bill of complaint, together with an allegation of presentation to this defendant, and of the latter's refusal to accept the same and to execute the deed called for therein and presented therewith. And that said plaintiff further averred and pleaded in his said original complaint in the sixth paragraph thereof and in his amended bill of complaint in the ninth paragraph thereof, "that upon such refusal by the defendant, the said one-half of the pur-
28 chase price of the property, to-wit, nine thousand two hundred and fifty dollars, was by this plaintiff deposited in the First National Bank of Deadwood, South Dakota, where the same now remains subject to the order of the defendant herein; that this plaintiff now offers to pay to the defendant one-half if any of all the taxes or other expenditures made by the defendant upon said property which have not already been paid to him from the income thereof, with interest thereon, and this plaintiff will bring the money in court for that purpose at any time during the progress of

this litigation." And at the close of said language plaintiff added in his amended bill of complaint the following: "And plaintiff offers to bring the money into court heretofore tendered the said defendant, and deposited in said bank for the use of said defendant, or so much thereof as may be found due to him upon an accounting had as hereinafter demanded, and also to pay to him any other or further sum which may be due said defendant under said contract." That to this paragraph of plaintiff's amended bill of complaint this defendant made answer admitting service upon him of plaintiff's written offer and tender, and possibly the presentation of a quit-claim deed therewith, also admitting that he had refused to accept the proposed tender and had refused to execute such deed, but denied information or belief as to whether the $9,250.00 was on deposit in bank to his order. That this defendant in said answer, beyond meeting and responding to the allegations of said amended bill of complaint, in their order, and substantially as in the answer as aforesaid, also stated and set forth two paragraphs of affirmative defense, numbered respectively 13 and 14, substantially as herein numbered 14 and 15 and made a part of this answer. That after Plaintiff's delay as aforesaid for two successive terms of court, and when the third term after issue joined in said action and suit was in session, to-wit, the regular September, 1895, term, this defendant presented to the said court his verified petition, averring that
29 he had made frequent overtures and offers to the plaintiff and his solicitors to settle said action and suit by admitting plaintiff to a joint interest or ownership in the property described in the amended bill of complaint, upon his accounting equitably to the defendant for the moneys expended in the purchase, protection and improvement thereof. And defendant then and there, in his said petition, renewed said offer and respectfully asked leave of the court to withdraw from his answer on the files of the court those portions thereof, heretofore referred to as paragraphs numbered 13 and 14, pleaded as affirmative defense, and to submit to a decree in plaintiff's favor on such terms as might by the court be found equitable and just. That upon this defendant's said petition to the court in said action and suit, the judge presiding therein, Hon. A. J. Edgerton, on September 26, 1895, signed and issued an order to the plaintiff and his solicitors to show cause before him at his chambers in the city of Deadwood on the succeeding day, September 27, 1895, at 2 o'clock p. m., why this defendant should not be allowed to withdraw from his answer paragraphs 13 and 14 thereof, and the cause be referred to the master in chancery of the court or some special master to be agreed upon between the parties, to take testimony and make an accounting between the parties to the suit touching the real property in controversy, and the moneys paid out by defendant on account thereof and interest thereon, and the rents, revenues and returns received by defendant therefrom and report the same to this court; or such other order be made in the premises as might seem meet and according to equity. That upon the return of said order to show cause, the plaintiff appeared by his solicitors and asked and obtained thirty days' time to answer the petition of

defendant on which said order to show cause was based; and this extension of time carried the cause over another term.

30 That at the regular February, 1896, term of said court the order to show cause aforesaid was brought on for hearing by this defendant before Hon. Alfred D. Thomas, then presiding and holding said court, when the plaintiff McPherson appeared in person and by his solicitors moved the court to dismiss his bill of complaint in the said cause in which said McPherson was plaintiff and complainant and this defendant was defendant; and at the same time said McPherson made a return and answer verified February 19, 1896, to said order to show cause and said petition of this defendant, in which he said: "In answer to the petition of the defendant, attached to the order to show cause herein, that he has moved this honorable court to dismiss the bill of complaint herein and desires to have such bill of complaint dismissed for the following among other reasons: The offer and tender of the purchase price for the property involved in this controversy was long since withdrawn by affiant, and was so withdrawn before the procurement of said order to show cause. When the tender was made to the defendant by affiant's direction the property in controversy was of very considerable value, so much so that if affiant's demand had been complied with by the defendant, as it ought to have been at the time of such tender, and affiant given an interest in said property, it could have been sold for a sum which would have realized the price which affiant was willing to pay therefor and a considerable profit in addition, but the defendant refused to accept the tender and refused to give affiant any interest whatever in said property, and refused to carry out such contract and denied that plaintiff was entitled to any interest whatever in said contract. Affiant further says that afterwards, and before the order to show cause was procured in this case, the property in controversy was very much depreciated in value and would not have sold and will not now sell and is not worth in the market near the amount

31 which affiant was willing to pay therefor. Therefore defendant having declined to receive the tender or to give affiant any interest in said property whatever, denying to him any right to dispose of the same and refusing himself to dispose of it, or any portion of it, this affiant did not deem it incumbent upon him to leave so large an amount of money idle, nor did he feel himself bound in anywise to make any other tender, or to pay the price which he was willing to pay therefor while said property was of value. Affiant further says that the only offer which the defendant has ever made to this affiant to accept this affiant as a co-owner in said property or to carry out the contract set out in the bill of complaint in this cause, has been accompanied by so gross and unreasonable an amount for expenditures in caring for the property as to indicate to affiant that if he became a co-owner with the defendant in the title to the property he would be constantly harassed by unjust and outrageous claims made as pretended expenditures for the care of said property and the collection of the income therefrom." And the said McPherson then proceeded further in his said affidavit and stated, "that the account which was

handed to him by the agents of this defendant contained charges amounting to $6,182.07, for the collection of rents upon said property amounting to $5,841.86, and contained other like charges for pretended expenditures," (all of which was a gross misstatement on the part of said McPherson and constituted no excuse for declining to submit to a reference where all such accounts could be examined and passed upon by the referee and the court), "which satisfied him that under no circumstances which could be seen and understood by him would it be possible to escape constant annoyance, litigation and loss by becoming a part owner of said property with the defendant;" and also stated that this defendant sub-
32 sequent to this account being handed to McPherson, "had admitted to him and stated that there were one or two thousand dollars of charges in the account which undoubtedly were income therefrom." And the said McPherson then proceeded fur- defendant tendered or offered to execute and deliver to him any conveyance to the one-half interest in said property, or for any portion thereof, or to give him any reasonable information, or to exhibit to him any vouchers for any expenditures which he had made with reference to said property." And the said McPherson then concluded his said affidavit in the words following, towit: "Affiant further says that the contract set out in the bill of complaint does not require this affiant to pay any part of the purchase money for said property, but the same is to be paid at affiant's option out of the proceeds of the sales thereof. Affiant was willing at the time, nevertheless, to pay all that the said Miller could possibly be under obligations to pay at any time, and take title to himself of his share of the property to the end that it might be disposed of while the ruling the market rates for said property were of the character which affiant has indicated, and which would have paid both of the parties a fair profit; but since defendant's refusal to convey for an unreasonable time and the depreciation of the value of the property, affiant is not willing now to exceed the strict letter of the contract with reference to the mode and manner of reimbursing the said defendant for the original purchase price thereof. Wherefore, the complainant prays this court to discharge the order to show cause and dismiss the bill of complaint herein as prayed for in this motion." Which affidavit was then subscribed by Donald A. McPherson, the plaintiff, and sworn to before a notary public on February 19, 1896.

That thereupon said motion of plaintiff to dismiss and said order to show cause on behalf of defendant granted prior to the
33 making of such a motion as aforesaid, came on to be heard before the court, this defendant by his solicitors resisting said motion of plaintiff to dismiss and insisting that defendant's petition on which said order to show cause was based constituted a plain acceptance of plaintiff's tender and offer and a contract which should be enforced by the court, and the plaintiff by his solicitors opposing such contention and insisting upon plaintiff's motion; and after hearing, argument on behalf of the parties respectively, and due consideration by the court, it was, on the 22nd day of February, 1896, by the court considered and ordered that the motion

of the complainant to dismiss his bill of complaint be granted and that complainant's bill of complaint be dismissed at complainant's cost, and that decree be entered accordingly. And thereupon, on February 22, 1896, the court, Hon. Alfred D. Thomas presiding, duly made, rendered and entered the following judgment and decree in said cause: "This cause coming on to be heard upon the application of the defendant, Joseph Swift, for leave to withdraw from his answer now on the files of this court, paragraphs 13 and 14 thereof, and submit to a decree in plaintiff's favor on such terms as may be found equitable and just, and upon the order granted September 26, 1895, by the judge of this court, requiring the plaintiff or his solicitors to show cause why defendant should not be allowed to withdraw from his answer said paragraphs 13 and 14 thereof, and this cause be referred to the master in chancery of this court or some special master to be agreed upon between the parties, to take testimony and make an accounting between the parties to this suit, touching the real property in controversy, and the moneys paid out by defendant on account thereof, and interest thereon, and the rents, revenues and returns received by defendant therefrom, and report the same to this court, or such other order be made in the premises as might be meet and according to equity;
34 and the same being now heard before this court, upon the petition of Joseph Swift, verified by his solicitor, Edwin Van Cise, upon which said order to show cause was based and upon the resisting affidavit of the plaintiff, Donald A. McPherson, this day submitted and filed; and at the same time the complainant, by his solicitors, filing his motion in this court to dismiss his bill of complaint heretofore filed herein in this case, the complainant, Donald A. McPherson, appearing by his solicitors, G. C. Moody and E. W. Martin, and the defendant by his solicitor, Edwin Van Cise, and the court having heard the matters in controversy upon the affidavits aforesaid, and the bill of complaint, verified answer and replication on file herein, and being fully advised in the premises; it is now ordered, that the application of the defendant be and the same is hereby denied, and the order to show cause granted September 26, 1895, be and the same is hereby vacated and discharged. It is further ordered, considered, adjudged and decreed, that this suit and the bill of complaint heretofore filed herein on behalf of the complainant and against the defendant, be and the same is hereby dismissed. It is further ordered and adjudged, that defendant have and recover of and from the complainant, Donald A. McPherson, the costs of this suit, taxed at $30.30. Done this 22d day of February, A. D. 1896, by the court."

And this defendant avers that the said motion and application of the plaintiff to dismiss his bill of complaint, after defendant's acceptance of the offers therein, was an open and voluntary abandonment and renunciation of his claim and cause of action, and that said judgment and decree of said court, made upon the hearing aforesaid, was and is a bar to any and all claims of the plaintiff in this action against this defendant and against his agent, Coe, and that the said plaintiff is barred and estopped thereby and ought not to have or maintain this action.

35 That by this defendant's said plea and his claim under said judgment and de-ree as a final adjudication, estoppel and bar to and against any other or further action against him or his agent for the same matter determined and adjudicated in and by said decree of February 22, 1896, there is drawn in question the validity of an authority exercised under the United States and the power and jurisdiction of said Circuit Court of the United States in and for the District of South Dakota to render and enter its said decree in defendant's favor, and the force and effect of said decree as a final adjudication in defendant's favor; and there is also drawn in question by this defendant's said plea and claim of bar, the validity of an authority exercised under the state of South Dakota, to-wit, the authority of a circuit court of said state, and of the supreme court in and for said state, and being the highest court in said state, to dispute and deny the force and effect of said decree of February 22, 1896, as a final adjudication in this defendant's favor, and thereby and by the exercise of such authority, and by a decision adverse to this defendant to assume, exercise and use an authority repugnant to the constitution and laws of the United States, and operating to impair the obligation of said judgment as a contract, in violation of the provisions of Section X, of Article I, of the Constitution of the United States and also by such an adverse decision if rendered to dispute and deny to said judgment and decree the full faith and credit to which it is entitled in said circuit court and said supreme court of the state of South Dakota, in violation of section I of article IV of the constitution of the United States and the general laws of congress in that behalf, and the decisions of the United States courts in construction and enforcement thereof; and also by such an adverse decision, if rendered, to deprive defendant of his property, to-wit, said judgment and decree of February 22, 1896, and the full force and effect thereof as a final adjudication, estoppel and bar, without due process of law and to deny
36 defendant the equal protection of the laws in violation of the Fourteenth Amendment to the constitution of the United States, and statutes passed in pursuance thereof; and there is further, in and by this defendant's plea and his claim under said judgment and decree of February 22, 1896, as a final adjudication, estoppel and bar, a title, right, privilege and immunity claimed by this defendant under the constitution and statutes of the United States,to-wit, the provisions of the constitution just cited and referred to and all statutes enacted in pursuance thereof, and a right, privilege and immunity claimed by this defendant under an authority exercised under the United States, to-wit, the authority of said circuit court of the United States in and for the district of South Dakota, to render and enter its said judgment and decree of February 22, 1896, and this defendant specially sets up and claims such right, privilege and immunity, to-wit, that said judgment and decree of February 22, 1896, so rendered in and by said circuit court of the United States in and for the district of South Dakota, is and has been ever since the date of its rendition aforesaid, a full, final and conclusive determination and adjudication of the matters in contro-

versy between the parties in the action and suit in which such judgment and decree was rendered, and was and is a final adjudication, estoppel and bar to and against the maintenance and prosecution of this action and suit; and that the circuit court and supreme court of South Dakota ought so to hold. and that if they should hold otherwise and decide adversely to this defendant's plea, that such holding and decision either made or affirmed by the highest court in the state, would be subject to re-examination, review and reversal by the supreme court of the United States, upon a writ of error, under section 709 of the revised statutes of the United States, being also section 709 of the United States Compiled Laws of 1901. And by virtue of the premises and the matters hereinbefore set forth, a "federal question" arises in this action, and this
37 defendant here pleads the same and asserts the rights, privileges and immunities accorded to him by the constitution of the United States and its statutes aforesaid.

17. This defendant for a further answer and defense alleges: That after said abandonment and withdrawal of said action and suit by said plaintiff, and the dismissal thereof by a decree of the said United States circuit court, the said plaintiff, as this defendant is informed and believes, frequently in an open and public manner, disavowed and disclaimed any interest in said property described in said instrument of date May 14, 1888, or any claim of interest therein, and that thereupon and thereafter, relying upon such abandonment by said plaintiff of his said action and suit, and said decree of court dismissing the same, and said disavowal and disclaimer by the plaintiff, this defendant believing that he would have peace and security for his title and no further annoyance from plaintiff on account thereof, proceeded to expend large sums of money in and about the improvement of said property and in enhancing the value thereof, (which plaintiff had declared to be so depreciated that he had no further desire to become a joint owner therein), and in advertising and making the same known to buyers and investors, and was thereby able to secure and did secure parties to buy or lease parts of said property, and locate improvements thereon, thus greatly enhancing the value of the remainder thereof, of all of which plaintiff had full knowledge; and that plaintiff ought not now to be allowed, in view of his conduct in the premises, and his abandonment of his claim as valueless in February, 1906, and the enhanced value of the property brought about by this defendant's efforts as aforesaid, or permitted to reassert or reinstate his claim of interest and ask for a share or accounting of the sales made or an interest in the property remaining.

38 18. This defendant for a further answer and defense alleges: That if the plaintiff ever had a claim or cause of action against this defendant of any kind whatever, nevertheless, in his conduct aforesaid as shown in his complaint and alleged in this answer, and in his delay in the premises, he has been guilty of laches and neglect in the assertion of such claim, and the same has now grown stale and inequitable, and plaintiff ought not to be allowed to vex, disturb and annoy this defendant therewith, or with this or any action in attempted assertion thereof.

19. And for a further answer and defense this defendant alleges: That he has been in the open, notorious, exclusive and uninterrupted possession of the real property in controversy since the acquisition of title thereto by him from Christain H. Vehmeyer, on or about May 8, 1888, and has duly made payment of all taxes legally assessed thereon, and that plaintiff has at all times had knowledge of such possession, and his alleged and so-called predecessor in interest, James K. P. Miller, at all times prior to his death, and after such purchase by this defendant, had knowledge of such possession by defendant and acquiesced in the same; and that from the time of this defendant's obtaining title to said property from said Vehmeyer as aforesaid, and his entering into possession as aforesaid, this defendant claimed title to said real property and right of possession thereof adversely to all the world, subject only to the employment and compensation of said Miller as his agent during the continuance of his agency; and that from and since the time of said Miller's death, January 12, 1891, and his ceasing to be the agent of this defendant in and about the care of said real property, this defendant has in good faith claimed title to said real property, and its rents, revenues and profits, and the right of possession thereof adversely to the estate of said James K. P. Miller and to all the world, of all of which plaintiff has had knowledge and the representatives of said estate have had knowledge; and if ever any right of action
39–185 existed against this defendant on account of said real property or of the instrument of May 14, 1888, relating thereto, it accrued more than ten years prior to the bringing of this action by plaintiff, and it is therefore barred by the statutes of limitation of this state.

Wherefore, this defendant prays that the complaint and cause of action of the plaintiff may be dismissed finally and on the merits of the action, and that defendant may have his costs.

WILLIAM R. STEELE,
EDWIN VAN CISE,
*Attorney- for Defendant, Joseph Swift.*

STATE OF SOUTH DAKOTA,
*County of Lawrence, ss:*

A. W. Coe being duly sworn deposes and says he is the agent of the defendant Joseph Swift, has read the foregoing answer and the same is true to his best knowledge, information and belief. The reason this verification is not made by said Swift is that he is not a resident of South Dakota and is not now within said State to this affiant's knowledge; and affiant is acquainted with the facts and matters in controversy between the parties to the action.

A. W. COE.

Subscribed and sworn to before me this 24th day of August 1901.

[SEAL.] CHAS. H. NELSON,
*Notary Public.*

* * * * * * *

186 In the Circuit Court of the Eighth Judicial Circuit within and for Lawrence County, South Dakota.

DONALD A. MCPHERSON, Plaintiff,
vs.
JOSEPH SWIFT and A. W. COE, Defendants.

*Objections to Findings and Conclusions Offered by Plaintiff and Requests for Findings and Conclusions by Defendant.*

Now comes the defendant Joseph Swift, by his attorneys Edwin Van Cise and C. L. Wood, and objects to certain of the proposed findings of fact offered on behalf of plaintiff, and at the same time suggests respectfully why he objects to such findings. And said defendant also requests herewith certain findings and conclusions, and states why he desires findings and conclusions on the points included therein.

1. Defendant objects to all of plaintiff's proposed finding numbered 1, except the first sentence, reciting the execution of the agreement, because there is absolutely no evidence whatever to support it; it is a negative finding based upon some theory that because defendant was unable to introduce evidence to support the allegations of paragraphs thirteen and fourteen of his answer (evidence offered but excluded upon plaintiff's objection), plaintiff may be privileged to find that such allegations are untrue, which is not the law nor the practice.

(This objection was overruled by the Court, to which ruling the defendants duly excepted.)

2. Defendant objects to the proposed finding numbered 2 as unfair in omitting the names of other executors named in the will, and requests that said finding be amended to recite that Miller nominated Joseph Swift, E. B. Beecher and William H. Swift as executors of his will, that he devised all his property to them in trust; that these three duly qualified without bond as provided in the will, and that they were removed as executors upon the application and petition of D. A. McPherson, cashier of the First National Bank of
187 Deadwood, and William Selbie, cashier of the Merchants National Bank of Deadwood, each bank a large creditor of the Miller estate. But there is no evidence that they or either of them ever resigned the trust vested in them by the will, or that they or either of them have ever been removed from such trust. Defendant objects to the finding that the Selbie letters of administration have not been revoked, as not based upon the evidence; and defendant especially objects to the last sentence of said proposed finding No. 2 that Selbie by his appointment as administrator with the will annexed became and was vested and charged with all the interest which Miller had in the contract of May 14, 1888, and in the property ther-in described,—for that such recital is not based upon any evidence whatever and is a conclusion of law, and as defendant respectfully submits an erroneous conclusion.

(The foregoing objections were overruled by the Court, and the request for a finding for defendants was declined and refused by the Court, to which ruling the defendants duly excepted.)

3. The defendant objects to the proposed finding numbered 3, because it is in direct contradiction of the evidence, which shows that Swift was in possession of the contract and of the lands and tenements referred to both before and after the date of Miller's death under a claim of exclusive right in himself, and after Miller's death under a denial of any right in the estate of said Miller, and this is so declared in plaintiff's original complaint in the former action verified June 17, 1893, and in his amended complaint in federal court. Further, it can not be found that Joseph Swift was in possession as executor and trustee, when he had two associates named in the will and qualified as executors. Nor can this finding be sustained as a conclusion of law.

(This objection was overruled by the Court, to which ruling the defendants duly excepted.)

4. The defendant objects to the statement in proposed finding No. 4, that none of the debts had been paid at the time of the appointment of Selbie as administrator because not an issue here, nor
188 supported by a particle of evidence, and based only upon a theory that want of evidence on the subject justified such a negative finding. He also objects to the finding that it became and was necessary to sell the property belonging to the estate as a question of law for the County Court, and its order if made would be the proper finding.

(These objections were overruled by the Court, to which ruling the defendants duly excepted.)

5. The defendant objects to the proposed finding No. 5 and its recitals of "duly made," "duly sell," and "duly executed" as conclusions of law and not in that form proper findings of fact, and defendant respectfully requests that instead of the recital "duly made and entered an order," the order be set out; and instead of the recital "did duly sell, assign and transfer unto the plaintiff" etc., the order of confirmation and accompanying proceedings be set out; and instead of the recital "did on January 11, 1893, by deed duly executed * * * transfer and convey unto the said plaintiff all the interest of said estate in and to said contract and premises therein described," the deed itself be set out or a fair abridgment thereof.

(The foregoing objection was overruled by the court, and the request for a finding for defendants was declined and refused by the Court, to which ruling the defendants duly excepted.)

6. The defendant objects to the word "duly" and "due" when occuring in the recitals in proposed finding No. 6, because constituting in that form conclusions of law and not proper findings of fact; and defendant requests that in lieu of such recitals the return of proceedings referred to be set out by a fair abridgment of its contents, also the notice and proof of service, also the protest of Swift and the proceedings of County Court including the order of confirmation and undertaking filed by McPherson. Defendant fur-

ther objects to the recital that the County Court examined witnesses because not supported by any evidence whatever.

(The foregoing objections were overruled by the Court, and
189 the request for findings for defendants was declined and refused by the Court, to which ruling the defendants duly excepted.)

7. The defendant respectfully requests that the proposed finding No. 7 be amended to read (as the evidence shows) that the dismissal of the appeal was in the spring or summer of 1895, by attorney for Joseph Swift, after he had been instructed by defendant Swift so to do and to cease defending the then pending suit of McPherson in federal court, and take steps to accept his tender and offer of copartnership.

(This request was declined and refused by the Court, to which ruling the defendants duly excepted.)

8. The defendant objects to the recital in finding No. 8, that McPherson paid to Selbie as administrator "for the purchase of the said property the full sum of five thousand and five dollars," because wholly unsupported by the evidence; and also objects to the finding as to want of interest in Selbie and non-cooperation by him, as not supported by the evidence.

(These objections were overruled by the Court, to which ruling the defendants duly excepted.)

9. The defendant objects to the proposed finding No. 9 as follows: To the recital "That during his life time the said James K. P. Miller performed all the conditions of said contract required to be performed by him," because wholly unsupported by the evidence, and in direct conflict with the evidence which shows he did not perform the conditions, that he failed to remit interest as agreed, and added the unpaid interest to the principal and otherwise failed in performance. And defendant objects to the last sentence of said proposed finding beginning with the words "That said title" and concluding with the words, "said plaintiff Donald A. McPherson," as constituting a mere partisan construction of the contract and as proffered conclusions of law and not findings of fact.

(These objections were overruled by the Court, to which ruling the defendants duly excepted.)

190 10. The defendant objects to this part of proposed finding No. 10, "for which he should account to plaintiff Donald A. McPherson in the manner and to the extent as hereinafter set forth," as stating a conclusion of law and not a finding of fact. The defendant objects to this recital, being the last sentence of said proposed finding:—"That said plaintiff Donald A. McPherson is the owner in fee of an undivided one-half interest of, in and to all of said property hereinbefore in this finding described," as not a finding of fact but a conclusion of law, and as defendant respectfully submits an erroneous conclusion. Defendant requests that this finding be amended by adding after the description of the property and its situation in the City of Deadwood, etc., these words: "There was no evidence showing these lots or any of them to be of any value whatever."

(The foregoing objections were overruled by the Court, and the request for a finding for defendants was declined and refused by the Court, to which ruling the defendants duly excepted.)

11. The defendant objects to the proposed finding No. 11, for that it includes some items in the total of rents and income, ($47,-999.31) which are duplicated, not supported by the evidence and not properly chargeable to such account; that it also includes, in the total of sales ($56,436.75) some items that are duplicated, not supported by the evidence, (notably $500 for an alleged sale attempted to be proven only by the recited consideration in a deed) and not properly chargeable to such account; that it fails to give credit for all costs, expenses, taxes, insurance, repairs, improvements, betterments, additional investments, other necessary expenses (notably $350 attorney fee and interest) and commissions and interest, and fails to give the aggregate of all or any of these items, and does not correctly calculate the interest or correctly apply the credits. And defendant further objects to the method of computation of interest and allowance of credits as a conclusion of law and not a finding of fact. But if it shall be *ehld* a proper subject of a finding of fact, then this defendant respectfully requests that in lieu of the
191 method there adopted the following be substituted as the proper way to compute the interest and state the account under this contract (without waiving defendant's contention that plaintiff is not entitled to recover at all or waiving any of his defenses in this action): Forasmuch as the property was never vacant the rate of interest should be 8% throughout as provided in the agreement. So, taking the new principal as given by Miller in his statements November 1, 1888 and December 1, 1888, $19,175.00, let the interest be computed thereon monthly at the rate of 8 per cent per annum, and find each month the amount of principal and interest,—indulging Miller with two months' rests from May 1, 1889 to July 1, 1890, as assented to by Swift, without waiving his rights under the agreement. The income from the property, after deducting 5% commission for collecting it should be first applied to the repairs, expenses, taxes, and insurance,—then to interest and then to principal. The cost of permanent repairs and benefits, as macadamizing, bulkheading, taxes, insurance, attorney fee for defending the property, and ordinary going repairs or the like, in excess of income, should be added to the principal, and all draw interest at 8% per annum payable monthly. Although this may result in compounding interest in a few instances, the plaintiff cannot claim a better rate in equity, for the deceased Mr. Miller in his statements and letters assented to this and the agreement names no other rate. No interest should be charged defendant Swift on collections after the repayment of his investment and interest.

But if the Judge declines to allow any compounding (of course against our exception) we suggest in the alternative that where the interest for any month is not paid by the receipts from the rents or sales or by Mr. Miller's remittance as provided in the agreement, then the excess of interest over receipts, wherever it occurs, be carried as a debit at 8% per annum until the aggregate receipts pay all or

any part, when, if a part, the balance be carried at 8% per annum
until paid in whole or in part and so throughout. As an il-
192 lustration, taking the interest on the new principal, $19,-
175.00 from November 1, 1888, to December 1, 1888, $127.83,
rents collected $121:25, leaves a balance to carry forward at 8% per
annum, $6.58; interest due January 1, 1889, $127.83, not paid, so
to draw same rate; interest due February 1, 1889, $127.83, net in-
come, $127.13. This may wipe out the $6.58 and interest, and re-
duce one of the others, or be applied on the January interest, leav-
ing a balance of $.70 to draw interest with the others.

We still insist, however, that the terms of the agreement, and the interpretation of it by both Miller and Swift, follow the other method although it may result in some compounding. And we do most strenuously object to any computation of interest on longer rests than one month, or at less than a rate of 8% per annum, as unsupported by the terms of the agreement, or any evidence in this case.

(The foregoing objections were overruled by the Court, and the requests for a finding for defendants were declined and refused by the Court, to which ruling the defendants duly excepted.)

12. This defendant objects to the proposed finding No. 12, for the reason that there is no evidence whatever to support it; that it is based wholly upon the allegations of the complaint, and response thereto in the answer, which should be left to speak for themselves, and are not the proper subject or basis for a finding of fact.

(This objection was overruled by the Court, to which ruling the defendants duly excepted.)

13. In connection with the proposed finding No. 13, the defendant requests that at the beginning thereof, the original complaint in the state court, verified June 17, 1893, be set out, as it is material to this controversy. He also requests that the date of the beginning of said action be corrected to read June 20, 1893, after the date of the verification of the complaint, said to have been personally served
with the summons.

193 The defendant also requests that in said proposed finding No. 13 in the recital thereof, following the order to show cause of September 26, 1895, the last sentence be expanded to read as follows: The plaintiff Donald A. McPherson, in said action, came into court on the morning of February 22, 1896, with his attorney, G. C. Moody, and then and there said McPherson personally filed with the clerk in open court the following affidavit and return to said order to show cause, to-wit: (Here affidavit follows as in plaintiff's proposed finding).

The defendant also requests that, in the same proposed finding No. 13, following the court order of dismissal and the exception thereto, this statement be added. This order was prepared by G. C. Moody, attorney for plaintiff McPherson, and as presented to the court for signature was in typewriting without the words, "Let decree be entered accordingly," which words are in pen and ink writing and in the hand of said G. C. Moody and were added by him to the typewritten order upon the direction of Judge A. D. Thomas, in

the presence of the plaintiff McPherson and of the attorney for defendant Edwin Van Cise and before the judge would sign the order. After these words were added, he signed the order and then and there wrote and signed the exception. Judge Thomas then also directed attorney Van Cise to draw the decree of dismissal, and in response to a request from attorney Moody that the words "without prejudice" be inserted in such decree, the Judge declined such words and said "this must be an end of the controversy," or words to that effect; and in response to a request of attorney Van Cise that the words "on the merits" be inserted in the decree, said Judge responded, "It is not necessary; look at your federal cases," or words to that effect. And thereupon said attorney Van Cise, as directed by said Judge, prepared the decree and presented the same later in the same day, which decree was signed and entered as presented, and it was the intention of the attorney for defendant in drawing said decree and of the Judge in signing and entering the same that it should be final. The exception noted is in the handwriting
194 of Judge Thomas. There is no evidence that any appeal was ever taken from this decree, or that it has been in any way modified or reversed.

(These requests were declined and refused by the Court, to which ruling the defendants duly excepted.)

14. The defendant objects to the proposed finding No. 14 because in direct conflict with the evidence, and with the recitals in the decree, which show that evidence, testimony and proof were submitted both upon the motion of Swift and the application of McPherson for leave to dismiss. And defendant especially objects to the recitals, "that there was no hearing or trial in said action in said United States Court upon the merits," "and that the said bill of complaint of said complainant Donald A. McPherson therein, was not dismissed upon the merits nor for want of equity," as conclusions of law, a misconstruction of the meaning and purpose of the decree and not proper in a finding of fact. In lieu of the first part of said finding prior to the recitals just quoted, if the Judge deems the question whether parol evidence or deposition was used material, defendant is willing and requests that the following may be substituted as a finding on the matter: No witnesses were examined nor depositions of witnesses read, and the time for taking of testimony had long passed without any being taken, but the hearing upon the application of defendant and the order to show cause and also the hearing upon plaintiff's application to dismiss were had just as recited in the decree,—upon the petition of Joseph Swift verified by his solicitor Edwin Van Cise, and the return and resisting affidavit of Donald A. McPherson, and the bill of complaint, verified answer and replication on file in the cause; and that said bill of complaint and cause of action of complainant was thereupon dismissed as recited in the decree, at complainant's costs.

(The foregoing objections were overruled by the Court, and the request for a finding for defendants was declined and refused by the Court, to which ruling the defendants duly excepted.)

15. The defendant objects to the proposed finding No. 15
195 because it constitutes two conclusions of law, first an attempted construction of McPherson's affidavit as not constituting abandonment or renunciation, and second an attempted construction of the decree as not a bar to the present suit, and both these matters are questions of law for the Court,—the first to be considered with McPherson's other acts and conduct, the second to be considered upon its own recitals and in the light of testimony adduced upon this trial. But if the Judge shall be of a contrary view and deem this a proper subject for a finding of fact, then defendant further objects that the recital that "plaintiff Donald A. McPherson in said previous action did not openly or otherwise abandon or renounce his claim or cause of action, but on the contrary stood upon his strict rights under the contract as he understood them," is an unnecessary negative statement that is wholly unsupported by the evidence, and in direct conflict with the evidence. And in lieu thereof defendant respectfully requests that the finding may be changed to read as follows: That the plaintiff McPherson in filing his application to dismiss his former suit in federal court and in securing the dismissal thereof, did openly abandon and renounce his claim and cause of action and did then intend to abandon and renounce the same.

(The foregoing objections were overruled by the Court, and the request for a finding for defendants was declined and refused by the Court, to which ruling the defendants duly excepted.)

16. The defendant objects to the proposed finding No. 16, because it is wholly unsupported by the evidence and in direct conflict with the evidence, and the last sentence is a conclusion of law. And this defendant respectfully requests that in lieu of said proposed finding No. 16, the Judge may find as follows: That the plaintiff McPherson, after the dismissal on his part of said former suit, openly and publicly disavowed and disclaimed any interest in the property involved in this controversy, and in any moneys that had been received by defendant from sales or rentals thereof; that defendant Swift made expenditures by way of improvements and
otherwise upon said property because of and relying upon
196 conduct and statements of plaintiff, and the property advanced and increased in value by reason of the efforts, labors and expenditures of the defendant. That plaintiff had abandoned his claim of interest in the property and intended to abandon the same until about the time of the sales to the Railroad Companies in the fall and early winter of 1899 and the bringing of this action in June, 1901. And plaintiff has been guilty of laches and neglect and his claim if ever any he had has grown stale and inequitable.

(The foregoing objection was overruled by the Court, and the request for finding for defendants was declined and refused by the Court, to which ruling the defendants duly excepted.)

17. The defendant objects to the proposed finding No. 17 because it is largely propositions and conclusions of law, and where attempting to recite a fact it is without support from the evidence, and in direct conflict with the evidence adduced upon the trial of this

cause. And in lieu of such proposed finding this defendant respectfully requests the following finding of fact: That defendant Swift has been in the open, notorious, exclusive and uninterrupted possession of the real property in controversy since May 8, 1888, the date of the Vehmeyer deed to him, and that James K. P. Miller acted as his local agent in collecting rents, etc., until the date of Miller's death, January 12, 1891, under the agreement of May 14, 1888, but without evidence of other authority of any kind. That there is no evidence in this cause of any recognition or acknowledgment by Swift in any manner of any right, title, interest or claim of said Miller or his estate in or to said property or any part thereof. That Miller rendered services in attending to the collection of rents and payment of taxes, insurance, repairs and other proper expenses and reserved his compensation for such services as provided in the contract and in some instances in excess of the amount there provided for. That upon the death of said Miller, January 12, 1891, Swift at once treated the contract of May 14, 1888 as terminated and at an end. He and his co-executors did not inventory
197 or schedule the property or any interest in it, as in any manner belonging to or constituting an asset of the Miller estate; Swift at once employed new agents, Coe & Edmonds, and later A. W. Coe, and through these agents collected rents and paid taxes, insurance, repairs, etc., as a personal and individual matter, in open disavowal and repudiation of any theory of partnership with Miller or trusteeship of his estate, or interest of his heirs or creditors of any kind in this property. And this was all well known to plaintiff McPherson, from the date of Miller's death. This action was commenced June 18, 1901, by issue of a summons with complaint served on Swift at Wilmington, Delaware, June 26, 1901, more than ten years after the death of James K. P. Miller. Joseph Swift has paid the taxes on this property ever since May, 1888, as the owner thereof, in good faith,—his agent Miller attending to the payment thereof during his lifetime from remittances made him by Swift or collections from rents or proceeds of sales of property if any on hand; and since Miller's death such taxes have been paid annually by Swift, by remittances to his local agents. Mr. Coe died since the former trial of this action and Clara D. Coe has been local agent of defendant Swift since his death, and is now such local agent.

(The foregoing objection was overruled by the Court, and the request for a finding for defendants was declined and refused by the Court, to which ruling the defendants duly excepted.)

18. This defendant objects to the proposed finding No. 18, as a statement not contemplated by the statute or the practice of this State, without support from the evidence adduced upon the trial of this cause, and in direct conflict with it, and not a proper finding to be made in this cause.

(This objection was overruled by the Court, to which ruling the defendants duly excepted.)

19. This defendant respectfully requests that the following be adopted as a finding of fact in this cause, based upon the evidence

adduced upon the trial thereof: Defendant Swift purchased
198 of one Christian Vehmeyer, May 8, 1888, by warranty deed of that date, for a consideration of $18,500 the real property described in the complaint and generally referred to as U. S. Mineral claims Nos. 45 and 53, excepting small portions thereof hitherto conveyed. And six days thereafter on May 14, 1888, at New York City, Swift entered into the agreement with Miller set out on the complaint.

(This request was declined and refused by the Court, to which ruling the defendants duly excepted.)

20. Defendant Swift also requests that the following be adopted as a finding of fact in this cause, based upon the evidence adduced upon the trial thereof; The defendant Swift has since his purchase of said property May 8, 1888, been in the sole and exclusive continuous, actual possession, control and management of the same under claim and color of title based on the deed from Vehmeyer of that date, and made and asserted in good faith; that Miller was his local agent and acted for Swift who was principal, in the collection of rents and payment of taxes, insurance and repairs until the time of his death, under the agreement of May 14, 1888, and was fully compensated for his services in that behalf. That upon said Jiller's death January 12, 1891 defendant selected new agents who have since, without interference from plaintiff or any one else, attended to the duties heretofore discharged by said Miller. That at once upon said Miller's death said Swift asserted in good faith and upon the advice of counsel, learned in the law, and has ever since asserted, that he was the sole and exclusive owner of said property and the whole thereof, and that if Miller had ever had any interest in it it was contingent and terminated with his death. And said Swift has also ever since the date of said Miller's death openly and notoriously denied by his acts, declarations and conduct that either the estate of Miller or his executors, administrators, heirs or creditors had any interest of any kind in or to said real property or any part thereof, and has at all times since May 8, 1888 and since January 12, 1891 asserted the ownership and possession of
199 said real property and the whole thereof, exclusive in himself and adverse to the whole world. And during the whole of said time since May 8, 1888, and since January 12, 1891, said Swift has paid all taxes legally assessed on said real property lands and tenements.

(This request was declined and refused by the Court, to which ruling the defendants duly excepted.)

21. The defendant respectfully requests that the following be adopted as a finding of fact, based upon the evidence introduced upon the trial of this cause: The property in controversy had materially depreciated in value between the time of the bringing of the former action, June 20, 1893, and its removal to federal court and the date of the decree therein, February 22, 1896; it remained unsold and without demand from the last date and of about the same value until August, 1899, when values advanced and a sale was made to one railroad company to the amount of

$12,000, and in December, 1899 two sales made to another railroad company amounting to $13,600. Plaintiff McPherson learned of these sales when they were made but did not begin this action until June 18, 1901.

(This request was declined and refused by the Court, to which ruling the defendants duly excepted.)

22. The defendant respectfully requests that the following be adopted as a finding of fact based upon the evidence introduced upon the trial of this cause: The plaintiff had knowledge of defendant Swift's adverse claim to and possession of the property in controversy from their inception, January 12, 1891. Said defendant after that date, during his possession, and to the knowledge of plaintiff, expended large sums of money in bulkheading Whitewood Creek upon its course across this property, for the protection of the property, also further large sums in the payment of special taxes to the city of Deadwood for macadamizing Sherman Street across the property, and also for attorney fees in successfully defending against law suits seeking to establish liens to the amount of about $8,000 upon a portion of the property. The plaintiff made no tender or offer at any time to pay any portion of these expenditures or any of the taxes paid annually by the defendant Swift, or any part of the principal sum invested by him or interest thereon, except the offer pleaded in the complaint in his prior action, afterward withdrawn.

200

(This request was declined and refused by the Court, to which ruling the defendants duly excepted.)

23. The defendant respectfully requests that the following be adopted as a finding of fact based upon the evidence adduced upon the trial of this cause: The defendant Coe was joined in this action merely as the local collecting agent of the defendant Swift, and no relief was sought against him except merely that funds should remain in his hands for the purpose of the accounting sought. The present action is identical with that in which the decree was entered February 22, 1896, in the thing sued for and the relief asked, in the cause of action, contract and transaction involved, in the persons and parties in interest in the action, and in the quality and relation of the persons for and against whom the claim is made.

(This request was declined and refused by the Court, to which ruling the defendants duly excepted.)

24. The defendant respectfully requests that the following be adopted as a finding of fact based upon the evidence adduced upon the trial of this cause. The decree of February 22, 1896, if any doubt arise as to its meaning, is shown by the evidence adduced to have been rendered upon a hearing and consideration of the bill of complaint, and verified answer on file, including the agreement of May 14, 1888, and the affidavits submitted and filed, when plaintiff was in default for not taking evidence under the rules of federal court, and said hearing and consideration and said decree passed upon and determined the precise questions now at issue by the pleadings in this action, and to be determined by the decree to be rendered in this action; and said decree of February 22, 1896,

was intended to be final by the attorney who prepared it, by
201 the Judge who signed and entered it, and by its own terms and recitals.

(This request was declined and refused by the Court, to which ruling the defendants duly excepted.)

25. The defendant respectfully requests that the following be adopted as a finding of fact based upon the evidence adduced upon the trial of this cause: The decree of February 22, 1896, was, when rendered to the gain and advantage of plaintiff and the loss and disadvantage of defendant Swift as a contrary decree such as then asked for in plaintiff's bill of complaint and his tender and offer therein made and as sought to be accepted by defendant by his application and the order to show cause, would have brought to defendant a large sum, to-wit, at least $17,800 for principal, interest and additions to the investment, of which plaintiff escaped the payment by said decree. The defendant Swift suffered a further loss and disadvantage in having, within a few months previous thereto, caused the dismissal of his appeal from the County Court's order of confirmation of sale upon which the deed to McPherson was made, and directed such dismissal in reliance upon his being able to secure McPherson's payments as theretofore tendered and offered in his pending suit and bill of complaint in federal court. The defendant Swift took no appeal, however, from this decree, but had reason to believe and did believe that it was the end of litigation and as effectual as a reversal of the county court orders and decrees, and so acted upon such belief that it would now work great injustice to him to allow plaintiff to reassert the same claim, as then abandoned and decreed to be dismissed, by his complaint in this new pending action.

(This request was declined and refused by the Court, to which ruling the defendants duly excepted.)

26. The defendant respectfully requests that the following be adopted as a finding of fact based upon the evidence adduced upon the trial of this cause: The plaintiff McPherson had actual notice of the adverse claims of defendant Swift, and alleged in his
202 original complaint, verified June 17, 1893, and amended complaint, verified August 11, 1893, that Swift had since the decease of Miller repeatedly repudiated the claim of his estate and of plaintiff to the property or its proceeds, and that Swift and his associates as executors had refused to inventory this property, and asserted that the estate had no interest in it, and said McPherson made similar accusations in his petition to remove the executors; and he was advised by the petition of Selbie for leave to sell the land contracts including the contract of May 14, 1888, set out in the complaint, that the validity of such land contracts was denied and would be sustained if at all by litigation, and he could have escaped liability if any existed under his bid, by withdrawing it at the time of the hearing in County Court when Swift by his attorney offered a greatly better bid (to buy peace and make an end of strife), and by permitting such bid of Swift's to be accepted.

(This request was declined and refused by the Court, to which ruling the defendants duly excepted.)

27. The defendant respectfully requests that the following be adopted as a finding of fact, based upon the evidence adduced upon the trial of this cause: The plaintiff at the same time he bid at the administrator's sale for the property in controversy, described in the County Court order of sale as "Land contract as to Hwk. M. C. 45 and 53," bid also on the following land contracts the sums following respectively: L. W. Beecher contract on Franklin & Baer building $20; Thomas H. Bissell contract on the Hood & Scott stable $115; Louisa D. Cook contract on the Headquarters Saloon $140; the same party contract on Walton's Place $100; Charles H. Graham contract on the Steam Laundry $100; Jackson & Lester contract on the Nye property $25; H. B. Ryerson contract on lot 5, block 2, Sherman Street $5; Elma Ann Stockin contract on south half of lot 15, Main Street $25; Sweatman & Ogden contract on lot 13, block 2, Sherman Street $25; same on lot 15 block 2, $25; same on John Burnham property $10; same on lot 11, block 2, $15; same on John Treber property, $100; same on Star &
203 Bullock corner, $100; same on Carter property, lot 1, block 2, $25; W. H. Swift contract on McHugh property, Main Street, $10; same party, contract on Cuthbertson block, Main street, $25; and on the following land contracts of Joseph Swift defendant; On lot 17, block 4, Holstein property $25; Gem Theatre $50; Wardner & Baxter saloon $25; Shoudy property $25; Merchants National Bank building $100. And sales were reported by the administrator as made by him to McPherson on such bids. On contracts of Joseph Swift, fo. 11 rock lots, Lower Main Street, there was reported no bid, and on the contract on the Butterfield property there was no bid. At the hearing in the County Court, notwithstanding the protests and Joseph Swift's offer to pay $7,500 for the claims of the administrator to all these contracts of his order to buy peace, which was a bid of $1,270 in excess of the aggregate bids of McPherson on the Joseph Swift contracts, and notwithstanding Swift's offer to bid ten per cent more than McPherson or $5,505.50 on the contract in controversy, and McPherson's counter bid and increase of ten per cent or $5,555.50 McPherson was allowed to withdraw his bid, then both of Swift's bids were overruled and rejected, and the original bids of McPherson were accepted and sales to him confirmed. Instead of the bond required by statute from the purchaser for each specifi-d contract or contract interest, (so reported sold to McPherson and order of confirmation made by the court), to inure to the benefit of the holder of the contract, a general undertaking on all sales was offered and approved, not purporting to inure to such holder's benefit, but the benefit and indemnity of the administrator and those entitled to the interest of the Miller estate, which was accepted and approved against the protest of parties whose contracts had thus been attempted to be sold, including defendant Swift. And said bids of McPherson were approved and sales to him of each and all of said contracts and property were confirmed by the County Court.

(This request was declined and refused by the Court, to which ruling the defendants duly excepted.)

204 28. The defendant respectfully requests that the following be adopted as a finding of fact based upon the evidence adduced upon the trial of this cause: Although McPherson thus claimed to be the purchaser of eighteen land contracts at administrator's sale, between different persons and the deceased Miller, for an aggregate sum of $890 and of five land contracts between Joseph Swift and the deceased Miller for an aggregate sum of $225.00 beside the one in controversy here, and all of said sales to him were ordered confirmed by the County Court, nevertheless he never brought any action or suit as to any one of them or attempted to recover upon any one of them except this in controvery in the present action.

(This request was declined and refused by the Court, to which ruling the defendants duly excepted.)

29. The defendant respectfully requests that the following be adopted as a finding of fact, based upon the evidence adduced upon the trial of this cause: The proceedings for the sale upon which plaintiff bases his claim of title, show that in the petition for sale, to-wit, in its Exhibit B entitled "Land contracts," the administrator attempted to describe the properties by initials, numerals and abbreviations The description claimed to be intended for the property in controversy here, was "Hawke patent U. S. M. C. 45 and 53." In the order of sale the description was "Land contract as to Hwk. M. C. 45 and 53." In the advertisement the same description was given. In the report of sale the description was "Hawk M. C. Patent U. S. M. C. 45 and 53." In the deed the description was expanded to read, (for the first time referring to the contract by date): "All the right, title and interest of the said decedent and the said estate in the following described contract and in the real estate described therein: Such contract being between said Jams K. P. Miller, deceased, and Joseph Swift, of date the 14th day of May, 1888, and relating to the Hawke Placer claims U. S. M. C. No. 45 and U. S. M. C. No. 53, at Deadwood, Lawrence County, South Dakota, for the consideration of five thousand and five ($5,005) dol-
205 lars. For a further description of said contract and the land and property embraced therein reference is hereby made to the record of said contract in the office of the Register of Deeds of Lawrence County, South Dakota, in Book No. 82, pages 394 and 395."

(This request was declined and refused by the Court, to which ruling the defendants duly excepted.)

30. The defendant respectfully requests that the following be adopted as a finding of fact based upon the evidenced adduced upon the trial of this cause: The policy of the administrator Selbie after his appointment was to claim dominion for the estate only over those properties he thought could be sold, and he did not make such claim nor serve notices of the character set out in the complaint claiming such dominion and offering to serve as agent, in regard to any properties on which contracts were outstanding in which he thought there was no profit.

(This request was declined and refused by the Court, to which ruling the defendants duly excepted.)

31. The defendant respectfully requests that the following may be adopted as a finding of fact based upon the evidence in this cause: The plaintiff McPherson in his petition for removal of the executors verified January 22, 1892, valued the claimed interest of the Miller estate in the contract with Swift in controversy here as at least the sum of $50,000 and other contract interests afterwards claimed to be bought by him at administrator's sale at large amounts. The valuation put upon this land contract by the administrator in his petition for leave to sell August 5, 1892 was $10,000. The bid of McPherson for it at the sale in November, 1892, was $5,005.00, and in McPherson's verified petition for dismissal he stated the property was very much depreciated in value and would not sell and was not worth in the market near the amount he had been willing to pay therefor (the tender had been $9,250), and because of such depreciation in value and disinclination to have Swift for a partner he withdrew his tender and asked to dismiss his suit.

206 (This request was declined and refused by the Court, to which ruling the defendants duly excepted.)

32. The defendant respectfully requests that the following may be adopted as a finding of fact based upon the evidence in this cause: The defendant, Swift, on January 7, 1893, took and perfected an appeal to the Circuit Court from the order of confirmation and other orders to the County Court of December 31, 1892, and such appeal was pending on January 11, 1893, when the administrator's deed was made.

(This request was declined and refused by the Court, to which ruling the defendants duly excepted.)

33. The defendant respectfully requests that the following may be adopted as a finding of fact based upon the evidence in this cause. There was no bond given by plaintiff McPherson as required by Statute upon the confirmation of the sale to him and the execution of the administrator's deed.

(This request was declined and refused by the Court, to which ruling the defendants duly excepted.)

34. The defendant respectfully requests that the following may be adopted as a finding of fact, based upon the evidence adduced upon the trial of this cause: The plaintiff, McPherson, made no tender or offer to contribute in any way towards the expense of the care and maintenance of the property in controversy, or the payment of any share of the taxes, insurance, repairs or permanent improvements thereon, and while he received his administrator's deed January 11, 1893, the macadamizing or paving tax was levied in 1894, and was a matter of common notoriety, known to the people generally and to the plaintiff McPherson personally, as also the litigation with Casey's creditors claiming a lien on the hotel foundation, and successfully resisted by defendant Swift.

(This request was declined and refused by the court, to which ruling the defendants duly excepted.)

207 35. The defendant requests that the following be adopted as a finding of fact, based upon the evidence adduced upon the trial of this cause: The dismissal of defendant Swift's appeal from the County Court orders of December 31, 1892, or dropping or abandoning such appeal in the spring or summer of 1895, in reliance upon his being able to secure plaintiff McPherson to pay for a half interest in the property as proposed in his pending suit in the United States Circuit Court and then losing out on his proposition to accept McPherson's offer in said suit operated as a disadvantage to Swift and a gain and advantage to McPherson.

(This request was declined and refused by the Court, to which ruling the defendants duly excepted.)

The defendant objects to each and every of the plaintiff's proposed conclusions of law, and in lieu thereof requests the following based upon the evidence adduced in this cause and the legal construction and effect thereof.

1. That defendant Joseph Swift was at all times after May 8, 1888, and his receipt of the deed from Vehmeyer, the owner in fee simple absolute of the premises described in the complaint.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

2. That the agreement of May 14, 1888, was without other consideration than is recited therein, and was a mere contract of employment with contingent interest in the profits, based on a promise to share the losses. This did not constitute a partnership, nor a power of any kind coupled with an interest, and made it non-enforceable by either party against the other, terminable at the pleasure of either, and terminated by the death of Miller.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

3. If the question of continuance or enforceability of this agreement, against repudiation by either party, were an open one,
208 then the acts, declarations and conduct of Swift on and after January 12, 1891, constituted repudiation on his part, and if McPherson ever obtained any interest in it by deed from administrator Selbie, his declarations, acts and conduct, in court February 22, 1896 and thereafter, constituted repudiation on his part.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

4. The proceedings of the administrator Selbie culminating in the deed to McPherson of January 11, 1893, were void for gross defects in the description, for want of a statutory bond, and for other irregularities stated in the findings; the administrator was without authority to enlarge and expand the description in his deed and thus attempt to render certain that which in the previous proceedings were uncertain, and said deed was therefore void and carried no title to plaintiff to the property in controversy.

(The foregoind request for a conclusion of law was declined and refused by the Court, to which ruling the deefndants duly excepted.)

5. The want of a statutory bond from the administrator and the pendency of an appeal from the order of confirmation perfected January 7, 1893, left the administrator without authority to execute the deed of January 11, 1893, and the same was void and carried to plaintiff no title nor right to maintain this action.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

6. The offer of the administrator Selbie as set out in paragraph 10 of plaintiff's complaint to look after the property, collect rents, etc., was without sanction of Court and without any authority in the law, and as said offer did not and could not bind the estate it constituted simply an individual offer of service by Selbie, which Swift was at full liberty to reject without any prejudice to his con-
209 tentions in this action.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

7. The declared policy of the administrator to serve such notices and assert dominion for the estate over those properties only on which there were contracts outstanding in which he thought there was a profit, constituted a theory of selection that was grossly inequitable. If the estate was entitled in any view to possible profit on any of the contracts with defendant or other parties, it should have recognized a liability for possible losses on other contracts.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

8. The course of plaintiff McPherson in abandoning all of eighteen purchases (confirmed to him) of contracts had by Miller with other parties, and in abandoning five other purchases (confirmed to him) of contracts with defendant Swift, and his failure to give a bond or obligation on which Swift could recover, and the acts and conduct of McPherson in the County Court proceedings, and his varying estimates of value of these contracts at different times, indicate his claim to have been purely speculative, and evince such a want of good faith and good conscience on said McPherson's part as should deny him relief in a court of equity.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

9. The possession of defendant Swift of the premises in controversy from May 8, 1888, was personal and individual, and Mr. Miller was his agent without power or authority to contract except for lease or repairs. He was not a partner in the investment, nor had he a power coupled with any interest therein.

210 (The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

10. The proper construction and legal effect of the agreement of May 14, 1888, was an issue before the United States Circuit Court on February 22, 1896, and in and by its decree of that date said

agreement was construed adversely to the contention of plaintiff and favorably to the contention of the defendant Swift.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

11. Forasmuch as defendant's application and the court's order to show cause based thereon was disallowed, the paragraphs 13 and 14, and all other matters of denial, answer and averment in said answer contained, were considered by the court as evidence in said cause, upon the trial thereof, and in the rendition of the decree of February 22, 1896, and legal effect were given to the same by said court in accordance with the Federal equity practice.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

12. The acts, declarations and conduct of the plaintiff in the Federal court, in filing his affidavit, moving through his attorneys for a dismissal of his case, and procuring the decree of February 22, 1896, in his suit then pending, constituted a deliberate choice and election of remedies on his part, with full knowledge of his rights and of the facts; and such decisive election at that time bars him from maintaining this action for the same relief he sought in the other, and which, on February 22, 1896, he asked and induced the court to deny.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

211 13. The filing by plaintiff personally of his voluntary verified application to dismiss the action in Federal Court February 22, 1896, was a retraxit or open and voluntary renunciation of any right of action he may then or theretofore have had, and constitutes a bar to the maintenance of the present action.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

14. The decree of February 22, 1896, was a final adjudication upon the merits, and constitutes a bar to the maintenance of the present action.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

15. This action is barred by the general statutes of limitations of this state.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

16. This action is barred by the statute of February 9, 1891, being chapter 24, of the Session Laws of that year.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

17. There is a Federal question involved in this cause, to-wit, the construction and legal effect of the decree of February 22, 1896, and by the decisions of the Federal Court, and by the terms of said decree, to which full faith and credit must be given by this Court,

said decree must be here held to be a final adjudication and a bar to the maintenance of the present action.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

212 18. The plaintiff has been guilty of laches and inexcusable neglect in asserting his claim against defendant Swift in this action, and the claim is now stale and wanting in equity to such extent as to constitute a bar to the maintenance of the present action.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

19. The acts and conduct of the plaintiff in this action, from the time of his joining Selbie, in the motion for the removal of the executors, have been so wanting in equity, so clearly in violation of the rules and maxims of equity, as to bar him from recovery in this action.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

20. If Miller ever had any title, either legal or equitable, or any interest either absolute or contingent, in the property in controversy, it passed by Miller's will, and the probate thereof, to William H. Swift, E. B. Beecher and Joseph Swift as trustees, and they were all necessary parties to this action. Without the presence of William H. Swift and E. B. Beecher, or a showing that they have resigned or legally transferred their trust, or have been removed as trustees and successors appointed and brought before the Court, this Court cannot render a decree herein, except for dismissal.

(The foregoing request for a conclusion of law was declined and refused by the Court, to which ruling the defendants duly excepted.)

21. The plaintiff is not entitled to recover and decree should be entered in favor of defendants for a dismissal of the complaint and cause of action upon the merits and at the plaintiff's costs.

(The foregoing request for a conclusion of law was de-
213 clined and refused by the Court, to which ruling the defendants duly excepted.)

The defendant further respectfully asks that he may be allowed an exception to each and every finding and conclusion accepted or adopted from those proposed on behalf of plaintiff, and also allowed an exception to each ruling and order of the Court over-ruling any objection hereinbefore made by defendant, and also an exception to each ruling and order refusing or denying a request of finding or conclusion hereinbefore proffered by defendant, and that he may be permitted in the bill of exceptions or in such place as may preserve it in the record, a separate exception after each finding and conclusion as adopted, and after each objection overruled and request denied, a notation of such adverse ruling and denial with our exception.

Respectfully submitted,

C. L. WOOD,
EDWIN VAN CISE,
*Attorneys for Swift.*

(The above exceptions were allowed by the Court to each and every finding and conclusion signed, adopted and made by the Court, and exception also allowed to each ruling and order overruling an objection made by defendants and to each ruling and order declining and refusing a request for finding or conclusion by or on behalf of defendants' and permission was given to defendants to insert such exception at the conclusion of each paragraph of finding or conclusion adopted and each objection overruled and request refused.

And thereupon the Court on January 10, 1910 adopted, made and signed and on January 13, 1910, filed (modifying plaintiff's proffered findings and conclusions to a slight extent) the following as its decision in this cause:

214 In the Circuit Court of the Eighth Judicial Circuit Within and for Lawrence County, South Dakota.

DONALD A. MCPHERSON, Plaintiff,
vs.
JOSEPH SWIFT, and A. W. COE, Defendants.

*Decision.*

This above entitled action came on duly for trial at the court house in Deadwood, Lawrence County, South Dakota, on the 17th day of June, 1909, being a day of the regular February 1909 terms of said court, before the Honorable Joseph W. Jones, judge, sitting without a jury, acting for and in behalf of the Honorable W. G. Rice, judge of the Eighth Judicial Circuit, and at his request and in his absence from the Judicial Circuit, said plaintiff appeared in person and by his attorneys, Martin & Mason and Chambers Kellar. Said defendant, Joseph Swift, appeared by his attorneys, Edwin Van Cise, Esq., and C. L. Wood, Esq., and the Court having heard the evidence and testimony adduced in behalf of said respective parties, and the arguments of counsel, and being fully advised in the premises, makes and files this, his decision, consisting of the following separate Findings of Fact and Conclusions of Law:

*Findings of Fact.*

(1). That on May 14, 1888, the plaintiff's assignor, James K. P. Miller and the defendant, Joseph Swift, mutually executed and delivered an agreement in writing, a copy of which is contained in paragraph one of the complaint. That said defendant, Joseph Swift, received a valuable consideration for the execution of said contract. That said contract was not procured from the said defendant, Joseph Swift, by means of any misrepresentations whatsoever on the part of said James K. P. Miller, nor by the suppression of any facts whatsoever. That said Miller did not represent to the said de-
215 fendant Swift that he was a man of large means of property, nor that he was solvent or responsible. That said James K.

P. Miller was not acting as the agent or representative of one Christian H. Vehmeyer in the purchase of said property, and that said James K. P. Miller did not have any agreement with the said Vehmeyer as to a division of $3500 or any other sum, between the said Miller and the said Vehmeyer, and that there was not divided between the said Vehmeyer and the said Miller the sum of $1,500 nor any other sum. That said Miller did not make a commission or profit of $750 on the sale of said property. That the allegations and statements contained in paragraphs fourteen and fifteen of defendant's answer, as to various alleged misrepresentations, false or fraudulent statements claimed and alleged to have been made by the said Miller to the said Joseph Swift, as untrue, and that said defendant, Joseph Swift, was not induced to enter into said contract by any false or fraudulent or wrongful statements or representations whatsoever on the part of said James K. P. Miller.

(To the making of the foregoing finding the defendants duly excepted.)

(2) That said James K. P. Miller died on January 12, 1891, having property in Lawrence County, South Dakota. That said James K. P. Miller left a will, by the terms whereof the said Joseph Swift was nominated and appointed one of the executors and trustees of the estate of said James K. P. Miller and that said Joseph Swift was thereafter, to-wit, on February 24, 1891, duly appointed as such executor of said will by the county court of Lawrence County, South Dakota, and thereupon immediately qualified as such executor and continued to act as such until the 27th day of April, 1892, upon which date the said Joseph Swift was removed as such executor of the said will of the said James K. P. Miller, deceased. That after the removal of said Joseph Swift as executor of the last will and testament of the said James K. P. Miller, to-wit, on May 23, 1892, one William Selbie was duly appointed as administrator with the will annexed of the estate of said James K. P. Miller, by the said
216 county court of Lawrence County, South Dakota, by an order duly given and made on that date. That said William Selbie, on June 1, 1892, filed with said county court the bond required by its order of appointment, with sufficient sureties, duly approved, and thereupon letters of administration with the will annexed upon the estate of James K. P. Miller, deceased, were duly issued by said court to the said William Selbie, and that said William Selbie thereupon duly qualified as such administrator and entered upon the discharge of his duties as such, and thereafter continued to act as the duly appointed and qualified administrator with the will annexed of said estate, and that said letters have not been revoked. That said William Selbie, by his appointment as such administrator with the will annexed, as aforesaid, became and was vested and charged with all the interest which the said Miller had in said contract, hereinbefore referred to, and in the property therein described.

(To the making of the foregoing finding the defendants duly excepted.)

(3) That during the period of time from the death of said James

K. P. Miller, on January 12, 1891, until the date of the removal of said Joseph Swift, as executor of the last will and testament of said James K. P. Miller, on April 27, 1892, the said defendant, Joseph Swift, was in the possession of said contract and the lands and tenements in controversy in this action, so far as the interest of the said James K. P. Miller was concerned, as such executor and trustee.

(To the making of the foregoing finding the defendants duly excepted.)

(4) That at the time of the death of said Miller he was owing debts and liabilities aggregating more than $100,000, none of which had been paid at the time of the appointment of said William Selbie as administrator, as aforesaid, and at the time of such appointment said estate was insolvent and still in debt to an amount of over $100,000, and that it became and was necessary to
217 sell the property belonging to said estate of said Miller, including the property described in the agreement set forth in paragraph one of plaintiff's complaint, hereinbefore referred to, in order to pay the debts of said estate.

(To the making of the foregoing finding the defendants duly excepted.)

(5) That on September 29, 1892, the county court of said Lawrence County, South Dakota, duly made and entered an order for the sale of certain property belonging to the estate of said Miller, including said agreement hereinbefore referred to and the property therein described. That under and by virtue of said order of sale, the said William Selbie, as administrator with the will annexed of said estate of said Miller, did duly sell, assign and transfer unto the plaintiff, Donald A. McPherson, all the right, title and interest of said estate in and to said contract and the premises therein described, and did, on January 11, 1893, by deed duly executed, acknowledged and delivered, under and by virtue of and pursuant to the said proceedings and the order of confirmation hereinafter referred to, transfer and convey unto the said plaintiff, Donald A. McPherson, all the interest of said estate in and to said contract and premises therein described.

(To the making of the foregoing finding the defendants duly excepted.)

(6) That said William Selbie, as administrator aforesaid, after the making of said sale of said contract and premises to the said plaintiff, McPherson, as aforesaid, duly made a return of his proceedings to the said county court, which was duly filed with the judge of said court. That due notice of the hearing of said return was given and that at such hearing the said defendant, Joseph Swift, appeared by his attorney and filed his protest to said sale and his objections to the confirmation thereof, and thereupon the court duly examined said return and witnesses in relation to the same, and after a full examination and hearing the pro-
218 ceedings of said William Selbie, as administrator aforesaid, were approved, and said sale was in all things fully confirmed, and the said William Selbie, as such administrator, was

ordered and directed to execute and deliver a deed conveying said property so sold to the said plaintiff, Donald A. McPherson, by an order of confirmation duly made and entered on or about the 31st day of December, 1892.

(To the making of the foregoing finding the defendants duly excepted.)

(7) That the said defendant, Joseph Swift, duly prosecuted an appeal to the Circuit Court of Lawrence County, South Dakota, from the said order of confirmation, and from the order of said county court overruling and denying the objections and protest of said Joseph Swift to the said sale. That said Joseph Swift, thereafter, in the spring of 1895, dismissed said appeal.

(To the making of the foregoing finding the defendants duly excepted.)

(8) That said Donald A. McPherson paid to the said William Selbie, as administrator aforesaid, for the purchase of said property, so sold as aforesaid, the full sum of Five Thousand and Five ($5,005.00) Dollars. That said William Selbie was not, either for himself or for the Merchants' National Bank, either directly or indirectly interested in the said sale, and that he was not cooperating in any way whatsoever with the said plaintiff, McPherson, in the purchase of said property.

(To the making of the foregoing finding the defendants duly excepted.)

(9) That during his life time the said James K. P. Miller performed all the conditions of said contract required to be performed by him, and that said property was purchased by the said James K. P. Miller with the money advanced by the defendant, Joseph Swift, with which to pay for said property, title thereto being taken in the name of said Joseph Swift, said property to be held
219 and disposed of under the terms and conditions as set forth in said contract. That said title was taken for the joint interest and benefit of said James K. P. Miller and said defendant, Jospeh Swift, and that said Joseph Swift held the title to an undivided one-half (1/2) interest in said property as trustee for the said James K. P. Miller, and now holds the title to such undivided one-half (1/2) interest of such portions of said property as have not already been disposed of, for the benefit of the said plaintiff, Donald A. McPherson.

(To the making of the foregoing finding the defendants duly excepted.)

(10) That a portion of said real property described in said contract was at the time of its purchase in 1888 occupied and improved real estate in the City of Deadwood, South Dakota. That the greater portion of said property has been sold. That from the rentals of such portions of said property as were improved, and from the sales of such portions thereof as have been sold, the defendant, Joseph Swift, has received large sums of money, for which he should account to the plaintiff, Donald A. McPherson, in the manner and to the extent as hereinafter set forth. That the portions of said real property still unsold are described as follows, to-wit:

Lots numbered one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), and twenty-nine (29), in Block numbered three (3); also

Lots numbered two (2), four (4), six (6), eight (8), ten (10), twelve (12), fourteen (14), sixteen (16), and eighteen (18), in Block numbered four (4); also

Lots numbered one (1), two (2), and three (3), in Block numbered five (5), also

Lots numbered two (2), four (4), six (6), eight (8), ten (10), twelve (12), fourteen (14), sixteen (16), eighteen (18), twenty (20), twenty-two (22), twenty-four (24), and twenty-six (26), in Block numbered six (6); also

Lots numbered one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), thirty-five (35), thirty-seven (37), thirty-nine (39), forty-one (41), and forty-three (43), in Block numbered seven (7); also

220 Lots numbered one (1), two (2), three (3), and four (4), in Block numbered eight (8); also

Lots numbered two (2), four (4), six (6), eight (8), ten (10), twelve (12), and fourteen (14), in Block numbered nine (9); also

Lots numbered three (3), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), and twenty-five (25), in Block numbered one (1);

all of said hereinbefore described lots being a part of Hawke Mineral claim No. 45. Also the following described lots, being a part of Hawke Mineral Claim No. 53, to-wit:

Lots numbered six (6), eight (8), ten (10), twelve (12), fourteen (14), sixteen (16), eighteen (18), twenty (20), twenty-two (22), twenty-four (24), twenty-six (26), twenty-eight (28), thirty (30), thirty-two (32), thirty-four (34), and thirty-six (36), in Block numbered thirty-five (35); also

Lots numbered seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), thirty-five (35), and thirty-seven (37), in Block numbered thirty-six (36); also

Lots numbered thirty-two (32), and thirty-four (34) in Block numbered thirty-seven (37);

All of said hereinbefore described lots being situated in the City of Deadwood, Lawrence County, South Dakota. That said plaintiff, Donald A. McPherson, is the owner in fee, of an undivided one-half (½) interest of, in and to all of said property hereinbefore in this finding described.

(To the making of the foregoing finding the defendants duly excepted.)

(11) That since the death of said Miller, the said defendant, Joseph Swift, has been collecting all the rents, incomes, issues and

profits of said property, and has also collected and received the proceeds of all sales of such portions of said property as have been sold. That the total amount of moneys received by the defendant, Joseph Swift, as rents and incomes from said property, since the purchase thereof up to June 1, 1909, not including the proceeds of sales, amounts to the sum of Forty-six thousand Nine Hundred Ninety and 27/100 ($46,990.27) Dollars. (This amount in the finding as offered was $47,999.31). That the total amount of moneys
221 received by the defendant, Joseph Swift, during that period as proceeds of the sales of such portions of said property as have been sold, amounts to the sum of Fifty-six thousand four hundred thirty-six and 76/100 ($56,436.76) Dollars, making a total aggregate of One hundred and three thousand, four hundred twenty-seven and 03/100 ($103,437.07) Dollars (in the finding as offered, $104,436.07) received from rents, incomes, sales, and all other sources in connection with the management, ownership or disposal of said property. That after the payment in full of all costs and expenses for taxes, insurance, repairs, improvements, betterments, additional investments for improvements and all other necessary expenses, and commissions on all collections and commissions on sales, and after repaying to the said defendant, Joseph Swift, the full sum of the original investment of $18,500.00, together with interest thereon, as provided by the terms of said contract, there still remains in the hands of said Joseph Swift, on June 1, 1909, the full sum of Twenty-two Thousand three hundred and seventy-five and 12/100 ($22,375.12) Dollars (in finding as offered $25,642.43) one-half of which sum, to-wit, the sum of eleven thousand one hundred and eighty-seven and 56/100 ($11,187.56) Dollars (in finding as offered $12,821.21), belongs to and is the property of the plaintiff, Donald A. McPherson, together with interest thereon at the rate of 7% per annum from June 1st, 1909, for which sum the said plaintiff is entitled to judgment. That in stating the said account and arriving at said net balance of $11,187.56 as the amount due from the defendant, Joseph Swift, to the plaintiff, Donald A. McPherson, the following method of computation of interest and allowance of credits was adopted by the court, to-wit:

The income from said property should be first devoted to the payment of necessary repairs, expenses, taxes, and insurance. Should they be insufficient in any month to satisfy those items, interest should be allowed from the date of payment of such excess until the surplus income is sufficient to satisfy such deficiency with interest.

If the income is more than sufficient to pay necessary repairs,
222 expenses, taxes and insurance, it should next be applied to the payment of interest on the principal, $18,500.00 at 8% per annum. And if any deficiency thereof remains, interest should be charged plaintiff at 8% from the end of each six months' period on one-half of such deficiency until the net surplus of income shall have paid such deficiency. Net proceeds of sales should be applied to the reduction of the $18,500.00 and any additional investments made by the defendant Swift. The defendant, Swift, should be allowed the 5% paid as commissions in the management and sale of

property and collection of rents. Interest should not be compounded, and except on the invested money, the proper rate is 7%. If the proceeds from rentals and sales of property shall more than repay the defendant, Joseph Swift, in the original investment of $18,500.00 and interest, as aforesaid, and any additional investments made by defendant, Swift, with interest as aforesaid, after the payment of all repairs, expenses, taxes, and insurance, and interest on any amount advanced by the defendant, Swift, on account of such repairs, expenses, taxes and insurance, the defendant, Joseph Swift, shall be charged interest on one-half (½) of such balance remaining in his hands at the rate of 7% per annum.

(To the making of the foregoing finding the defendants duly excepted.)

As a supplement to the foregoing finding No. 11, the Court upon handing down the written decision, January 10, 1910, added the following:

I have adopted as in general correct (so far as I am able after much labor to determine) the statement of account submitted in behalf of plaintiff, making however, the following deductions from the balance therein stated against Swift.

The account charges Swift with a large sum for rentals etc. Included in this is the sum of $1,009.04 under date of May 1, 1890 which is not supported by the evidence. No interest appears to be charged against this item in the account, hence no interest on
223 it will be charged back. I deduct also $406.66 charged by the accountant as interest on $262.66 carried by Miller to the investment account Nov. 1, 1888. As Miller made that disposition of the items without objection from Swift it should stand. I deduct also $500.00 charged to Swift as receipt from sale of real estate because not sustained by the evidence with $658.11 interest charged thereon $1,158.61. I credit Swift also with $350.00 Van Cise Attorney fee January 1895 with interest on same $353.00—$703.00.

Recapitulation:

| | | |
|---|---|---|
| Balance charged Swift by accountant..... | | $25,642.43 |
| Credit Swift as above..... | $1,009.04 | |
| | 406.66 | |
| | 1,158.61 | |
| | 703.00 | |
| | | 3,277.31 |
| Find balance charged Swift..... | | $22,375.12 |

one-half of which $11,187.56 should be paid by Swift to McPherson and for which judgment will be rendered.

(To the making of which supplemental finding so far as it adopts "as in general correct the statement of account submitted in behalf of plaintiff" the defendants duly excepted.)

(12) That prior to the commencement of this action the plaintiff demanded of said defendant, Joseph Swift, that he convey to plaintiff an undivided one-half (½) interest in such portions of

said property as had not theretofore been sold and conveyed by said defendant, Joseph Swift, and also demanded that said defendant, Joseph Swift, account to plaintiff for the moneys received by said defendant by reason of the sale of such portions of said premises as had been sold, and for such moneys as had been received by the said defendants as rents, incomes, issues or profits of said premises. That said defendant refused either to account to said plaintiff for any of said moneys, so as aforesaid received by him, and refused to recognize the plaintiff's ownership to an undivided one-half (½) interest in such portions of said property as had not been sold.

(To the making of the foregoing finding the defendants duly excepted.)

(13) That on May 20, 1893, the plaintiff, Donald A.
224 McPherson, began an action against the defendant, Joseph Swift, upon this same contract, and for the same relief as now sought in this action. The former action was begun in this court, the summons and complaint being personally served on Joseph Swift in Lawrence County. Thereafter the defendant, Joseph Swift, duly removed such action to the Circuit Court of the United States for the District of South Dakota, Western Division. Afterwards, by leave of said court, an amended bill of complaint was filed by said Donald A. McPherson against the defendant, Joseph Swift, on August 11, 1893, which was as follows, to-wit: (See ante in this bill of exceptions.)

To the foregoing amended bill of complaint the defendant Swift, on September 2, 1893, filed a demurrer, as follows: (See ante in this bill of exceptions.)

Afterwards this demurrer was brought on for argument and after hearing the same the Court, on May 10, 1894, entered an order overruling and denying the same, with leave to defendant to file an answer on or before the 1st day of July, 1894. The defendant, Joseph Swift, in said action, on July 13, 1894, filed his verified answer, as follows: (See ante in this bill of exceptions.)

The plaintiff, McPherson, filed his replication in said action on August 6, 1894, as follows: (See ante in this bill of exceptions.)

On September 26, 1895, the defendant Swift's solicitors presented to the Court and filed the following petition, verified by Edwin Van Cise: (See ante in this bill of exceptions.)

Upon presentation of the foregoing verified petition the following order to show cause was issued by the judge of said court; to-wit: (See ante in this bill of exceptions.)

The postponed hearing of said order to show cause was had at the next term of said United States Court, to-wit, on February 22, 1896. The plaintiff, McPherson, in said action, filed the following affidavit and return to said order to show cause, to-wit: (See ante in this bill of exceptions.)

225 On the same day, February 22, 1896, the solicitors for the plaintiff McPherson filed in said court their motion as follows: (See ante in this bill of exceptions.)

On the same day, February 22, 1896, the Court made the following order, to-wit: (See ante in this bill of exceptions.)

To which the defendant Swift duly excepted and his exception was allowed, as follows. (See ante in this bill.)

On the same day, February 22, 1896, the Court signed and entered the following decree: (See ante in this bill of exceptions.)

To which order and decree counsel for the defendant, Joseph Swift, excepted, and the exception was allowed, as follows: (See ante in this bill.)

(To the making of the foregoing finding defendants duly excepted.)

(14) That no evidence, testimony or proof was ever taken or submitted in said action upon the hearing of said motion of the defendant, Joseph Swift, for leave to withdraw from the answer of said Joseph Swift paragraphs 13 and 14 thereof and submit to a decree in plaintiff's favor, nor upon the hearing of said motion of the said complainant, Donald A. McPherson, for leave to dismiss his bill of complaint in said action, and that there was no hearing or trial in said action in said United States court upon the merits, and that the said bill of complaint of said complainant, Donald A. McPherson, therein, was not dismissed upon the merits nor for want of equity.

(To the making of the foregoing finding the defendants duly excepted.)

(15) That the said plaintiff, Donald A. McPherson, in said previous action did not openly or otherwise abandon or renounce his claim or cause of action, but on the contrary stood upon his strict rights under the contract, as he understood them, and a dismissal of said bill of complaint in said previous action, by the said plaintiff, Donald A. McPherson, in the manner as hereinbefore set forth, was not and is not a bar to this present suit.

226 (To the making of the foregoing finding the defendants duly excepted.)

(16) That the plaintiff, McPherson, did not after the dismissal on his part of said former suit, openly or publicly or in any manner whatsoever disavow or disclaim any interest in said property involved in this action. That the defendant, Swift, did not make any expenditures by way of improvements or otherwise upon said property because of any statement or conduct whatsoever on the part of the plaintiff, nor was there any enhanced or increased value of the property in controversy by reason of any efforts, labors or expenditures by the defendant. That the plaintiff has not in any manner abandoned his interest in said property, nor has he been guilty in any manner of any laches or negligence in the assertion of his claim thereto, and that the plaintiff's claim has not grown stale or inequitable.

(To the making of the foregoing finding the defendants duly excepted.)

(17) That the defendant, Joseph Swift, has not been in the open or notorious or exclusive or uninterrupted possession of the real property in controversy since May 8, 1888. That from the date of the purchase of said property in May, 1888, until the death of said James K. P. Miller, on January 12, 1891, the said Joseph

Swift openly notoriously acknowledged the right, title, interest and claim of the said James K. P. Miller in and to said property, and said Miller was in possession of said property and during said period of time was collecting the rents, and incomes therefrom and remitting the same to the said defendant, Joseph Swift, less such amounts as were properly expended by the said Miller in payment of taxes, insurance, repairs and other proper expenses. That after the death of said Miller, on January 12, 1891, the said defendant, Joseph Swift, was in the possession of said property as a partner executor and trustee of said Miller, until the date of the appointment of William Selbie as administrator with the will annexed of the estate of James K. P. Miller, on May 23, 1892. That this
227 action was commenced June 18, 1901. That said defendant, Joseph Swift, has not paid the taxes assessed upon or against the said property in controversy in this action except that the said defendant did upon several occasions advance the necessary taxes temporarily, but the same were repaid to the said defendant, Joseph Swift, in full, with interest thereon in each instance, within two or three years after such payment.

(To the making of the foregoing finding the defendants duly excepted.)

(18) I find that the allegations of plaintiff's complaint are true and that the allegations of defendant's answer, except as otherwise specifically found and stated in the foregoing findings, are untrue.

(To the making of the foregoing finding the defendants duly excepted.)

As conclusions of law from the foregoing findings and the admissions contained in the pleadings, the court decides:

(1) That plaintiff is entitled to judgment against the defendant, Joseph Swift, for the sum of $11,187.56, (in the conclusion as offered this amount was $12,821.21) with interest thereon at 7% per annum from June 1st, 1909, together with the costs and disbursements of this action.

(To the making of the foregoing conclusion the defendants duly excepted.)

(2) That plaintiff should be adjudged to be the absolute owner, in fee, of an undivided one-half (½) interest in and to the unsold portions of the real property described in plaintiff's complaint, such unsold portions being described in Finding No. 10 of this decision, together with all rents and incomes derived from said undivided one-half interest from June 1st, 1909.

(To the making of the foregoing conclusion the defendants duly excepted.)

(3) That the defendant, Joseph Swift, and all persons claiming or to claim under or through him should be perpetually enjoined and restrained from asserting any right, title, interest,
228–336 claim or demand of, in or to said undivided one-half interest in and to said property, and from in any wise interfering with the same or with the rents and incomes thereof.

(To the making of the foregoing conclusion the defendants duly excepted.)

Let judgment be entered accordingly. (To which defendant duly excepted.)

Dated, January 10, 1910.

By the Court:

JOSEPH W. JONES, *Judge.*

Attest:

SOL STAR, *Clerk.*

To the making of the foregoing findings and conclusions and to each of them the defendant Joseph Swift, by his counsel, then and there excepted, which exception is duly allowed.

JOSEPH W. JONES, *Judge.*

* * * * * * *

337 In the Circuit Court of the Eighth Judicial Circuit Within and for Lawrence County, South Dakota.

DONALD A. MCPHERSON, Plaintiff,

vs.

JOSEPH SWIFT and A. W. COE, Defendants.

*Judgment.*

This above entitled action came on duly for trial at the court house in the City of Deadwood, Lawrence County, South Dakota, on the 17th day of June, 1909, that being a day of regular February, 1909, term of said court, before the Honorable Joseph W. Jones, judge, sitting without a jury, acting for and in behalf of the Honorable W. G. Rice, judge of the Eighth Judicial Circuit of the State of South Dakota, and at his request and in his absence from said judicial circuit. Said plaintiff appeared in person and by his attorneys, Messrs. Martin & Mason and Chambers Kellar. Said defendant appeared by his attorneys, Edwin Van Cise, Esq., and C. L. Wood, Esq. The Court after hearing the evidence and testimony adduced in behalf of said respective parties, and the arguments of counsel, and being fully advised in the premises, duly made and filed its decision, consisting of separate findings of fact and conclusions of law.

Now therefore, by virtue of the law and the premises, the Court being fully advised, it is, upon motion of Messrs. Martin & Mason and Chambers Kellar, attorneys for the said plaintiff, Donald A. McPherson, hereby considered, adjudged and decreed that the said plaintiff have and recover of the said defendant, Joseph Swift, the sum of Eleven Thousand Seven Hundred and Eleven and 81/100 ($11,711.81) Dollars, together with the costs and disbursements of this action, to be taxed by the clerk of this court and herein inserted, and amounting to the sum of $— amounting in the
338 aggregate to the sum of — Dollars ($—).

It is further considered, adjudged and decreed that the said plaintiff, Donald A. McPherson, is the absolute owner in fee

of an undivided one-half (½) interest of, in and to the unsold portions of the real property described in plaintiff's complaint, which unsold portions are described as follows, to-wit:

Lots numbered one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27) and twenty-nine (29), in Block numbered three (3); also

Lots numbered two (2), four (4), six (6), eight (8), ten (10), twelve (12), fourteen (14), sixteen (16), and eighteen (18), in Block numbered four (4); also Lots numbered one (1), two (2), and three (3), in Block numbered five (5); also

Lots numbered two (2), four (4), six (6), eight (8), ten (10), twelve (12), fourteen (14), sixteen (16), eighteen (18), twenty (20), twenty-two (22), twenty-four (24) and twenty-six (26), in Block numbered six (6); also

Lots numbered one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), thirty-five (35), thirty-seven (37), thirty-nine (39), forty-one (41) and forty-three (43), in Block numbered seven (7); also

Lots numbered one (1), two (2), three (3), and four (4), in Block numbered eight (8); also

Lots numbered two (2), four (4), six (6), eight (8), ten (10), twelve (12) and fourteen (14), in Block numbered nine (9); also

Lots numbered three (3), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23) and twenty-five (25), in Block numbered one (1);

all of said hereinbefore described lots being a part of Hawke Mineral Claim No. 45. Also the following described lots, being a part of Hawke Mineral Claim No. 53, to-wit:

Lots numbered six (6), eight (8), ten (10), twelve (12), fourteen (14), sixteen (16), eighteen (18), twenty (20), twenty-two (22), twenty-four (24), twenty-six (26), twenty-eight (28), thirty (30), thirty-two (32), thirty-four (34) and thirty-six (36), in Block numbered thirty-five (35); also

339 Lots numbered seventeen (17) nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), thirty-five (35), and thirty-seven (37), in Block numbered thirty-six (36); also

Lots numbered thirty-two (32), and thirty-four (34) in Block numbered thirty-seven (37);

All of said hereinbefore described lots being situated in the City of Deadwood, Lawrence County, South Dakota,—together with all rents and incomes derived from said undivided one-half (½) interest of, in and to said property from the 1st day of June, 1909.

It is further considered, adjudged and decreed that the said de-

fendant, Joseph Swift, and all persons claiming or to claim under or through him, be, and are hereby perpetually enjoined and restrained from asserting or claiming any right, title, interest or demand of, in or to said undivided one-half (½) interest in and to said property, or any part thereof, and from in anywise interfering with the same or with the rents and incomes thereof.

It is further ordered that this judgment be entered by the clerk.

Done in open court this 2nd day of February, A. D. 1910.

By the Court:

JOSEPH W. JONES,

*Judge, Acting for and in Behalf of the Honorable W. G. Rice, Judge of the Eighth Judicial Circuit, and at is Request and in His Absence from said Judicial Circuit.*

Attest:

[SEAL.] SOL STAR, *Clerk.*

The foregoing judgment is to be entered without prejudice to the making of a motion for new trial by the defendants, and the settlement of their bill of exceptions; and all procedings for enforcement of the judgment by execution, are stayed for a period of 40 days, that defendants may have opportunity to present such motion for new trial, submit their bill of exceptions for settlement, and prepare and perfect an appeal; and the amount of undertaking for such appeal, to be approved by the clerk of Court, is fixed at $14,000 in addition to the statutory cost bond.

Dated February 2nd, 1910.

JOSEPH W. JONES, *Judge.*

340 (Endorsements:) In Circuit Court, Eighth Judicial Circuit, Lawrence County, S. D. Donald A. McPherson, Plaintiff, vs. Joseph Swift et al., Defendants. Judgment. Filed Feb. 8th, 1910. Sol Star, Clerk of Circuit Court, Lawrence County, S. Dak.

341 In the Circuit Court of the Eighth Judicial Circuit of the State of South Dakota within and for the County of Lawrence.

DONALD A. MCPHERSON, Plaintiff,

vs.

JOSEPH SWIFT and A. W. COE, Defendants.

*Notice of Motion for a New Trial.*

To the plaintiff above named and to Kellar & Stanley and Martin & Mason, his attorneys:

You will please take notice, that the defendants above named will move the above entitled court, at the chambers of the judge thereof, in the court house in the City of Deadwood, in said circuit,

on the 10th day of May, A. D. 1910, at two o'clock in the afternoon of that day, or so soon thereafter as counsel can be heard, to vacate and set aside the decision of the court, to-wit, the finding of fact and conclusions of law herein, and the judgment and decree rendered and entered thereon, and to grant a new trial of this action.

Said motion will be made and based upon the judgment roll, and upon all of the papers, pleadings and proceedings herein, and upon the bill of exceptions heretofore settled and filed herein, and will be urged upon all of the grounds and for all of the reasons and causes materially affecting the substantial rights of the defendants, which said grounds, reasons and causes are fully set out in the assignments and specifications of error attached to and made a part of said bill of exceptions heretofore served upon you and duly settled and certified as a bill of exception in this cause.

Dated at Rapid City, S. D., this 29th day of April, 1910.

CHAUNCEY L. WOOD,
EDWIN VAN CISE,
*Attorneys for Defendants.*

(Endorsed:) Service admitted etc., April 29, 1910, Kellar & Stanley, Att'ys for P't'ff.

(Endorsed:) Filed March 12, 1910, Sol Star, Clerk of Circuit Court, Lawrence Co., S. Dak.

342 In the Circuit Court of the Eighth Judicial Circuit of the State of South Dakota within and for the County of Lawrence.

DONALD A. MCPHERSON, Plaintiff,
vs.
JOSEPH SWIFT and A. W. COE, Defendants.

*Order Denying Motion for New Trial.*

Now at this time coming on to be heard the motion and application of defendants in the above entitled action to vacate and set aside the decision of the Court, to-wit, the findings of fact and conclusions of law herein and the judgment and decree rendered and entered thereon, and to grant a new trial of this action; Messrs. Chauncey L. Wood and Edwin Van Cise appearing on behalf of said motion and application and Messrs. Kellar & Stanley and Martin & Mason appearing in opposition thereto, and the Court being fully satisfied in the premises,

It is ordered that said motion and application be and the same is hereby overruled and denied.

Done this 10th day of May A. D. 1910. By the court.

JOSEPH W. JONES,
*Judge of the Circuit Court of the 2nd Judicial Circuit who Sat in the Trial of This Case and also in the Hearing of This Motion.*

Attest:
SOL STAR,
*Clerk of Court.*

To which order and ruling of the Court defendants by their attorneys at the time duly excepted. Dated May 10th, 1910.

JOSEPH W. JONES,
*Judge of the Circuit Court of the 2nd Judicial Circuit who Sat in the Trial of This Case and also in the Hearing of This Motion.*

(Endorsed:) Filed May 12, 1910, Sal Star, Clerk of Circuit Court, Lawrence County, S. Dak.

343–349 STATE OF SOUTH DAKOTA,
*County of Lawrence, ss:*

In the Circuit Court, Eighth Judicial Circuit.

DONALD A. MCPHERSON, Plaintiff,
vs.
JOSEPH SWIFT and A. W. COE, Defendants.

*Notice of Appeal.*

To Keller & Stanley and Martin & Mason, attorneys for the above named plaintiff and to Sol Star, clerk of the said Circuit Court:

Please take notice, that the above named defendants appeal to the Supreme Court of the State of South Dakota, from the judgment and decree of the said Court entered herein, on the 2nd day of February, A. D. 1910, and from the whole thereof; and also from the order overruling and denying the motion and application of defendants for a new trial and from the whole thereof.

Dated this 20th day of May, A. D. 1910.

CHAUNCEY L. WOOD,
EDWIN VAN CISE,
*Attorneys for Defendants.*

(Endorsed:) Filed May 26, 1910, Sol Star, Clerk of Circuit Court, Lawrence County, S. Dak.

Service of the within notice of appeal by copy is admitted May 21st, 1910.

CHAMBERS KELLAR,
MARTIN & MASON,
*Attorneys for Plaintiff Sol Star, Clerk of Courts.*

* * * * * * *

350 In the Supreme Court, State of South Dakota, October Term, A. D. 1910.

File No. 2949.

Present: Ellison G. Smith, Presiding Judge; Dighton Corson, Dick Haney, Chas. S. Whiting and J. H. McCoy, Judges of Said Court, and the officers thereof.

DONALD A. MCPHERSON, Plaintiff and Respondent,
vs.
JOSEPH SWIFT and A. W. COE, Defendants and Appellants.

This action coming on to be heard at the October A. D. 1910, Term of this Court at the Supreme Court Room, in the City of Pierre, State of South Dakota, upon the merits of the case and without oral argument and the Court having advised thereon and filed its decision in writing.

It is considered, ordered and adjudged, That the judgment and order of the Circuit Court, within and for Lawrence County, appealed from herein, be and the same is hereby affirmed.

And it is further ordered, That this action be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

And it is further ordered and adjudged, That Respondent have and recover of the Appellant costs and disbursements on this appeal, expended, taxed and allowed at Fifty-nine and no/100 Dollars.

By the Court,

[SEAL.] ELLISON G. SMITH,
*Presiding Judge.*

Attest:
FRANK CRANE, *Clerk,*
By ——, *Deputy Clerk.*

351 In the Supreme Court, State of South Dakota.

"H"—a—2949.

DONALD A. MCPHERSON, Respondent,
vs.
JOSEPH SWIFT and A. W. COE, Appellants.

Appeal from Circuit Court, Lawrence County.

Hon. Joseph W. Jones, Judge.

*Opinion. Filed Mar.* 29, 1911.

Chauncey L. Wood, Van Cise, Grant & Van Cise, for Appellants. Martin & Mason, Kellar & Stanley, for Respondent.

HANEY, *J.:*

In May, 1888, defendant Swift and one James K. P. Miller made a contract in writing, relating to certain deal property situated in

Lawrence county, record title to which was taken in the name of the former. Mr. Miller died in January, 1891. His estate was insolvent. The plaintiff, claiming to have succeeded to Miller's rights under the contract, through proceedings in the county court, instituted an action in the circuit court to enforce such rights. Such action was removed to the United States circuit court and later on was dismissed. Thereafter the present action was commenced, tried without a jury, judgment entered in favor of the defendants from which the plaintiff appealed and such judgment was reversed. McPherson v. Swift, 22 S. Dak. 165. A second trial having resulted in a judgment favorable to the plaintiff the pending appeal was taken by the defendants.

After the cause was reversed and remanded on the former appeal defendant Swift's separate answer was amended by adding
352 thereto a paragraph evidently designed to preserve a "federal question" for review by the United States Supreme Court, concerning the effect to be given the proceedings in the United States Circuit Court; otherwise the pleadings are the same now as on the former appeal and the evidence is the same except as to what occurred when the former action was dismissed in the United States court. An exhaustive statement of the issues will be found in the former decision of this court. The conclusions then announced are conclusive except insofar as the record on this appeal differs substantially from the one upon which such conclusions were based. Cornelius v. Ferguson, 23 S. Dak. 187.

It was determined by the former decision of this court that Miller died possessed of an interest in the property mentioned in his contract with defendant Swift, which passed to his estate or the benefit of his individual creditors; that none of the alleged affirmative defenses had been established; and that the plaintiff would have been entitled to a judgment in his favor if the record had disclosed a sustainable finding upon the issue of his ownership of such interest. It was the duty of the learned circuit judge to accept the conclusions of this court on the second trial of the cause. Therefore, the only questions now open to discussion are whether plaintiff acquired Miller's interest, the extent of the same, and the effect of the proceedings in the federal court.

In its former decisions this court said: "In this instance we think the record shows on its face that there was no adjudication on the merits. If, however, this be not so, it is clear that the contrary does not appear, and the court below erred in excluding parol evi-
353 dence offered by the plaintiff to prove that there was not, in fact, any determination of the issues involved. Either view entitles the plaintiff to a new trial so far as the defense of res adjudicata is concerned." Whether right or wrong the conclusions thus stated in the certified copy of the opinion of this court, required to be transmitted to the trial court when the case was remanded, expressed the law of the case, which the trial court was bound to follow on the second trial. It did so. It allowed additional testimony tending to prove that the adjudication in the federal court was not in fact on the merits. Its rulings on the admission and rejection of

evidence touching this issue were not erroneous. And it found "that no evidence, testimony or proof was ever taken or submitted in said action upon the hearing of said motion of the defendant, Joseph Swift, for leave to withdraw from the answer of said Joseph Swift paragraphs 13 and 14 thereof, and submit to a decree in plaintiff's favor, not upon the hearing of said motion of the said complain-t, Donald A. McPherson, for leave to dismiss his bill of complaint in said action, and that there was no hearing or trial in said action in said United States court upon the merits, and that the said bill of complaint of said complainant, Donald A. McPherson, therein, was not dismissed upon the merits nor for want of equity." This finding was justified by the evidence. Clearly then the court did not err in declining to sustain the defense of res adjudicata.

On the second trial plaintiff testified he was present in open court during the proceedings which resulted in the dismissal of the former action. In this respect the evidence differs from that disclosed by the record on the former appeal. The difference, however, does not change the conclusion of this court as then announced. Plaintiff's presence alone was not sufficient to establish a retraxit. This is the law of this case on that subject: "The contention that the
354 record in the former action discloses a retraxit which precludes the plaintiff from maintaining the present action is not tenable, even if it be assumed that anything of the sort is sanctioned by the rules of practice prevailing in this jurisdiction. At common law a retraxit is a voluntary acknowledgment that the plaintiff has no cause of action, and therefore will not proceed further, made in open court by the plaintiff in person. 18 Ency. Pl. & Pr. 898. Though the return to the order to show cause was verified by the plaintiff, there is nothing in the record to indicate that it was filed by the plaintiff in person, nor does it disclose an acknowledgment on his part that he had no cause of action. On the contrary, the reasons assigned therein for declining defendant's offer impliedly assert the existence of his alleged cause of action, and are not in the slightest degree inconsistent with an intention to further litigate his rights. The offer in plaintiff's complaint to pay a certain sum in consideration of having his claim to an undivided one-half interest in the remaining property recognized was not as essential element of his cause of action. He was, if the other allegations of his complaint were true, entitled to an accounting without any such offer or previous tender, and the withdrawal of the offer long after it had been refused was in no sense a renunciation of his right to insist upon an accounting." McPherson v. Swift, 122 S. Dak. 180.

It was suggested during the oral argument, though the question was not presented by the record, that the removal of the former action into the United States court deprived the state court of jurisdiction of the subject matter, such former action not having been remanded to the state court. Such conclusion could not be sustained even on the assumption that the question was properly pre-
355 sented and not determined by the decision of this court on the former appeal. With the exception of one decision and

some dicta the cases are unanimous in favor of the doctrine that when an action, removed into a court of the United States, is there dismissed without any trial or determination of the merits, the right of action still remains unaffected thereby, and the party having such right of action may again bring suit thereon in the state court, the same as though no previous suit had been brought. Gassman v. Jarvis, 100 Fed. Rep. 146; McIver v. Railroad, 110 Ga. 223; Rodman v. Railroad, 65 Kan. 645; Hooper v. Railroad, 106 Tenn. 28; Kruger v. Railroad, 84 Mo. App. 358; Fox. v. Packing Co., 96 Mo. App. 173; Young v. Telephone & Telegraph Co. 75 S. C. 326; Note to same case, 7 L. R. A. N. S. 501; 34 Cyc. 1309. Therefore, the trial court correctly decided that plaintiff was not precluded from maintaining the present action by reason of the proceedings in the United States Circuit Court.

To support the allegation that he had succeeded to Miller's rights under the contract the plaintiff introduced in evidence the last will and testament of the decedent. This will was duly probated in the county court on February 24, 1891, and letters testamentary were issued out of that court to defendant Swift, E. R. Beecher and William H. Swift, pursuant to the provisions of the will and immediately thereafter they qualified as executors thereunder and entered upon the discharge of their duties. Plaintiff also offered in evidence, from the records of the county court, a petition of certain creditors asking the removal of the executors; an order of the county court removing the same; a petition asking the appointment of William Selbie as administrator; an order appointing Selbie as administrator; Selbie's bond as administrator and letters of ad-
356 ministration; a petition of such administrator for authority to sell certain property belonging to the estate described therein; an order of sale; a report of sale; an order confirming the sale; and an administrator's deed to the plaintiff. All these instruments were received without objection. The trial court found: "That on September 29, 1892, the county court of said Lawrence county, South Dakota, duly made and entered an order for the sale of certain property belonging to the estate of said Miller, including said agreement hereinbefore referred to and the property therein described. That under and by virtue of said order of sale, the said William Selbie, as administrator with the will annexed of said estate of said Miller, did duly sell, assign and transfer unto the plaintiff, Donald A. McPherson, all the right, title and interest of said estate in and to said contract and the premises therein described, and did, on January 11, 1893, by deed duly executed, acknowledged and delivered, under and by virtue of and pursuant to the said proceedings and the order of confirmation hereinafter referred to, transfer and convey unto the said plaintiff, Donald A. McPherson, all the interest of said estate in and to said contract and premises therein described." Though the assignments of error occupy 49 closely printed pages they nowhere specify any particular wherein the evidence was insufficient to justify this finding. Nor does the appellant's printed brief, consisting of 166 pages, anywhere point out any particular in which the evidence is insufficient to justify the same. So the finding must be sustained.

Having found no reversible error in law occurring at the trial, or particular wherein the evidence is insufficient to justify the decision of the circuit court, assigned in appellants' abstract
357 or discussed in appellants' brief in accordance with the statutes of this state and the rules and decisions of this court, the judgment and order appealed from are affirmed.

358 In the Supreme Court, State of South Dakota.

"H"—r—2106.

DONALD A. MCPHERSON, Appellant,
vs.
JOSEPH SWIFT and A. W. COE, Respondents.

Appeal from Circuit Court, Lawrence County.

*Opinion. Filed April 9th,* 1908.

359 Martin & Mason, Chambers Kellar, Jas. G. Stanley, for appellant.
Edwin Van Cise, Frank L. Grant, for Respondent.

HANEY, *P. J.:*

This is an action wherein the plaintiff demands that he be adjudged to be the owner of an undivided one-half interest in certain real property situate in Lawrence county; that his title thereto be quieted and confirmed; that an accounting be had; that he have judgment against defendant Swift for whatever sum shall be found due; that the property be partitioned; that defendant Coe be restrained from paying rents and profits to defendant Swift pending the litigation; and that he have such other and further relief as may be just and equitable. He alleges in his complaint that on May 14, 1888, defendant Swift and one James K. P. Miller entered into the following written contract; "This contract, between Joseph Swift of Essex county, State of New Jersey, party of the first part, and James K. P. Miller of Deadwood, Lawrence County, Dakota, party of the second part, Witnesseth, That, Whereas, the said party of the second part has purchased for the said party of the first part, and for joint account, the property situated in the city of Deadwood, Lawrence County, D. T., known as the Hawke Mineral Claim, comprising U. S. mineral claims numbered fortyfive and fiftythree, excepting certain portions not deeded to said Swift as shown from his deed from Vehmeyer on record at register of deed's office, Lawrence county, D. T. And in consideration of the said party of the second part looking after said property, collecting the rents, attending to all the necessary repairs, paying taxes, insurance, etc., the said party of the first part agrees that the said party of the second part shall receive for said services one-half of all the net profits from said property, first deducting from said profits eight per cent per

annum interest on the $18,500.00 paid therefor. The said
360 party of the second part to remit to the said party of the first part monthly, or as fast as collected, the said interest and his half of the profits; and furthermore, in consideration of the said party of the second part agreeing to pay to the said party of the first part one-half of any ultimate loss that may occur on said purchase price of $18,500.00, the said party of the first part agrees that the said party of the second part shall receive one-half of the profits ultimately accruing from the sale of said property above the said purchase price of $18,500.00. The said party of the second part agrees that in case there be no income on the investment, owing to the property lying vacant of tenants at any time, to settle with and remit to the said party of the first part at least once each six months, eight per cent interest on one-half of the said purchase price of $18,500.00. Each party hereto pays in cash when due one-half of all costs upon said property, for taxes, insurance, repairs or other necessary expenses. All money realized from sales of any part of said property shall be remitted to said party of the first part and credited upon said sum of $18,500.00 purchase money, in liquidation thereof and stopping the eight per cent interest to extent of such credits. Additional investments for improvements subject to same conditions." He also alleges in substance that Miller died January 12, 1891, having property in Lawrence county; that William Selbie of Deadwood was appointed administrator with will annexed of the Miller estate, by the county court of Lawrence county, May 23, 1892; that Selbie qualified and entered upon the discharge of his duties; that Miller's estate was insolvent, owing debts to an amount exceeding $100,000; that it became necessary
to sell the real property belonging to the estate, including the
361 property in controversy, in order to pay debts owing by the estate; that on September 29, 1892, pursuant to an order of the county court, Selbie, as administrator, sold, assigned and transferred to the plaintiff, all the right, title and interest of the Miller estate in and to the aforesaid contract and in and to the premises therein described, and on January 11, 1893, by deed, duly acknowledged and delivered, transferred and conveyed to the plaintiff all the interest of such estate in and to said contract and the premises therein described; that such sale was confirmed by the county court December 29, 1892; that the consideration paid by the plaintiff for such transfer was the sum of $5,005; that Miller performed all the conditions of the aforesaid contract on his part; that the property was in fact purchased by Miller, Swift furnishing the money with which to pay for the same; that since Miller's death defendant Coe, as agent of defendant Swift, has been collecting the rents, issues, and income of the property and paying the same to Swift, less certain commissions; that Swift is not a resident of this state; that when the property was purchased title was taken in Swift's name in accordance with the aforesaid contract, for the joint interest and benefit of Miller and Swift; that the rents, issues, and income received by Swift have been more than sufficient to pay for all repairs, taxes, insurance, and other expenses properly chargeable to

the premises, together with $18,500, the original purchase price, and interest thereon as provided in the contract, and that there is a balance due to the plaintiff; that on July 22, 1892, Selbie, as administrator, notified Swift, in writing, that the Miller estate claimed an interest in the property and that he would care for it and account for rents and profits agreeably to the terms of the contract;
362 and that prior to the commencement of this action plaintiff demanded of Swift a conveyance of an undivided one-half interest in the property described in the contract remaining unsold, and an accounting, with which demand Swift refused to comply.

The cause was tried without a jury on the issues presented by the complaint and defendant Swift's separate answer, defendant Coe having been connected with the controversy only as the former's agent. Swift's answer is very voluminous, containing so many conclusions of law, arguments and unnecessary repetitions as to render an accurate statement of the issues somewhat difficult. It will be construed as denying all the material allegations of the complaint except those relating to the execution of the contract between Miller and Swift, the death of Miller, the insolvency of his estate, the notice and offer of the administrator, the plaintiff's demand for a conveyance and an accounting, and the collection by Swift of rents, issues and income subsequent to Miller's death; and as alleging the following affirmative defenses; (1) estoppel by conduct; (2) bar by retraxit; (3) res judicata; (4) general statute of limitations; (5) special statute of limitations; and (6) laches. It contains numerous allegations concerning the fraudulent procurement of the contract between Miller and Swift, but as no evidence was offered in support of such allegations they require no further notice. It also alleges in substance that the property described in the complaint was bequeathed by Miller to Swift and two other persons in trust for the purposes mentioned in the former's last will and testament.

It is contended the trial court's decision does not cover all the issues of fact presented by the pleadings, to the manifest prejudice of the plaintiff. The execution of the contract between
363 Miller and Swift is established. When it was executed legal title to the realty was in Swift. "Thenceforward", as found by the circuit court, "Miller collected the rents on this real property and accounted to Swift therefor, and for sundry improvements made on the property, and for a sale of some portion thereof, in accordance with the terms of the contract, until Miller's death, January 12, 1891." In other words, Miller performed his obligations under the contract while living. He was not merely an employé whose employment was terminated by his death. The execution of the contract created a partnership or a joint venture which was in essence and effect a partnership transaction, and though the stock in trade was real estate, it was, as to the interests of the parties, to be regarded as personal property. Rev. Civ. Code, 1723; Hyman v. Peters, 30 Ill. App. Ct. 134; Brady v. Kreuger, 8 S. Dak. 464; Betts v. Letcher, 1 S. Dak. 182. The parties were to share in the profits and losses, each was to pay one-half of the ex-

penses and each had authority to bind the other in matters relating to the property. The compensation for Miller's services depended solely upon the ultimate success of the enterprise. The property of a partnership consists of all that is contributed to the common stock at the formation of the partnership and of all that is subsequently acquired thereby. The interest of each member of a partnership extends to every portion of its property. The relations of partners are confidential. They are trustees for each other within the meaning of chapter 1, of the title on trusts. On the death of a partner, the surviving partners succeed to all the partnership property, whether real or personal, in trust for the purposes of liquidation, even though the deceased was appointed by agreement sole liquidator; and the interest of the deceased in the ultimate
364 distribution of the partnership assets passes to those who succeed to his other personal property. Rev. Civ. Code, 1726, 1727, 1732, 1761. So, from the undisputed facts, it necessarily follows that at the time of his death Miller had an interest in the property which he could not have bequeathed to any one in trust or otherwise to the exclusion of the creditors of his estate, and that such interest passed to his administrator for the benefit of his individual creditors. As to whether this interest was transferred to the plaintiff pursuant to an order of the county court the decision of the circuit court is silent. Manifestly, the acquisition of Miller's interest is an essential element of plaintiff's alleged cause of action. It is not the province of this court to make findings of fact in causes heard on appeal, though the evidence would clearly warrant them. It is error for a trial court to refuse or fail to find upon any material issue of fact. Taylor v. Vanderberg, 15 S. Dak. 480; McKenna v. Whittaker, 9 S. Dak. 442. Nevertheless such refusal or failure may not be ground for reversal because not prejudicial to any substantial right. When the existence of the omitted finding would not change the ultimate result—as where a complete affirmative defense is established, failure to find some fact essential to the plaintiff's cause of action will not justify a reversal. "The law neither does nor requires idle acts." Rev. Civ. Code, 2431. If, in this case, the plaintiff's alleged cause of action be barred by the statute of limitations, or, if by reason of any other properly established fact it clearly appears that he would in no event be entitled to recover, it would be absurd to order a new trial. Therefore, the judgment of the circuit court must be reversed unless it shall clearly appear that the plaintiff is precluded from obtaining any relief by reason of one or more of the alleged affirmative defenses.

365 The defenses of estoppel by conduct, bar by retraxit, and res judicata, rest on the record of a former action instituted May 20, 1893, wherein the plaintiff in this case was plaintiff and defendant Swift was defendant, and wherein substantialy the same cause of action was alleged and the same relief sought as in the present astion, such record being made a part of the circuit court's findings of fact. It was also alleged by the plaintiff in the former action that prior to its commencement he tendered to the defendant

$9,250, as the sum apparently due from the former to the latter in order to entitle the former to the full benefits of the contract; that prior to the commencement of the action he tendered to the defendant a quitclaim deed to an undivided one-half interest in the property described in the contract then remaining unsold; that he demanded a conveyance of an undivided one-half interest in the property; that the sum so tendered was deposited in a bank subject to defendant's order; that defendant refused to accept such tender or to convey an interest in the property as requested. It was alleged that this tender and demand was in writing. The complaint in the former action also contained an offer to bring the sum previously tendered into court and a sum sufficient to pay one-half of any taxes or expenses paid by the defendant, or any other sums found to be due the defendant under the contract, and to produce a quitclaim deed to an undivided one-half interest in the property. Subsequently the cause was removed to the United States circuit court, on defendant's motion, where a demurrer to the complaint was overruled and the defendant answered admitting certain allegations of the complaint, denying others, and alleging certain affirm-
366 ative defenses. Plaintiff's replication was filed August 6, 1894. On September 26, 1895, the defendant filed a verified petition reciting the history of the litigation and alleging "that this suit has now been pending over two years and four months; that this defendant is exceedingly anxious to dispose of it; that he has made frequent overtures and offers to the plaintiff and his solicitors to settle the same by admitting plaintiff to a joint interest or ownership in the property described in the amended bill of complaing upon his accounting equitably to this defendant for the moneys expended in the purchase, protection and improvement thereof. And your petitioner now renews this offer and respectfully asks leave of this honorable court to withdraw from his answer now on the files of this court those portions thereof numbered paragraphs 13 and 14, pleaded as affirmative defense, and to submit to a decree in plaintiff's favor on such terms as may to this honorable court be found equitable and just." Upon this petition an order to show cause was issued "why defendant should not be allowed to withdraw from his answer paragraphs 13 and 14 thereof, and this cause be referred to the master in chancery of this court or some special master to be agreed upon between the parties, to take testimony and make an accounting between the parties to this suit, touching the real property in controversy and the moneys paid out by defendant on account thereof and interest thereon, and the rents, revenues and returns received by defendant therefrom, and report the same to this court; or such other order be made in the premises as may be meet and according to equity." On February 22, 1896, plaintiff's solicitors moved to dismiss the complaint and on the same day the following affidavit was filed in answer to the order to show cause:
367 "Donald A. McPherson the complainant in the above entitled cause being duly sworn, says in answer to the petition of the defendant attac-ed to the order to show cause herein, that he has moved this honorable court to dismiss the bill of complaint herein and desires to have such bill of complaint dismissed, for the

following among other reasons: The offer and tender of the purchase price for the property involved in this controversy was long since withdrawn by affiant, and was so withdrawn before the procurement of said order to show cause. When the tender was made to the defendant by affiant's direction the property in controversy was of very considerable value, so much so that if affiant's demand had been complied with by the defendant, as it ought to have been at the time of such tender and affiant given an interest in said property, it could have been sold for a sum which would have realized the price which affiant was willing to pay therefor and a considerable profit in addition, but the defendant refused to accept the tender and refused to give affiant any interest whatever in said property, and refused to carry out such contract and denied that plaintiff was entitled to any interest whatever in said contract. Affiant further says that afterward and before the order to show cause was procured in this case, the property in controversy was very much depreciated in value and would not have sold and will not now sell and is not worth in the market near the amount which affiant was willing to pay therefor. Therefore, defendant having declined to receive the tender or to give affiant any interest in said property whatever, denying to him any right to dispose of the same and refusing himself to dispose of it, or any portion of it, this affiant did not deem it incumbent upon him to leave so large an amount of money idle nor did he
368 feel himself bound in any wise to make another tender, or to pay the price which he was willing to pay therefor while said property was of value. Affiant further says that the only offer which the defendant has ever made to this affiant to accept this affiant as a co-owner in said property, or to carry out the contract set out in the bill of complaint in this cause, has been accompanied by so gross and unreasonable an account for expenditures in caring for the property as to indicate to affiant that if he becomes a co-owner with the defendant in the title to the property, he would be constantly harassed by unjust and outrageous claims made as pretended expenditures for the care of said property and the collection of the income therefrom. Affiant further says that the account which was handed to affiant by the agents of said defendant contained charges amounting to $6,182.07, for the collection of rents upon said property amounting to $5,841.86, and containing other like charges for pretended expenditures, which satisfied this affiant that under no circumstances which could be seen and understood by affiant would it be possible to escape constant annoyance, litigation and loss by becoming a part owner of said property with the defendant. Affiant further says that defendant himself, subsequent to his account being handed to affiant, admitted to affiant and stated that there was one or two thousand dollars of charges in the account which undoubtedly were incorrect and wrong. Affiant further says that at no time has the defendant tendered or offered to execute and deliver to this affiant any conveyance to the one-half interest in said property, or for any portion thereof, or to give him any reasonable information, or to exhibit to him any vouchers for any expenditures which he has made with reference to said property. Affiant further
369 says that the contract set out in the bill of complaint does not require this affiant to pay any part of the purchase money

for said property, but the same is to be paid at affiant's option out of the proceeds of the sales thereof. Affiant was willing at the time, nevertheless, to pay all that the said Miller could possibly be under obligations to pay at any time, and take the title to himself of his share of the property, to the end that it might be disposed of while the ruling and market rates of said property were of the character which affiant has indicated, and which would have paid both of the parties a fair profit, but since defendant's refusal to convey for an unreasonable time and the depreciation of the value of the property, affiant is not willing now to exceed the strict letter of the contract with reference to the mode and manner of reimbursing the said defendant for the original purchase price thereof. Wherefore, the complainant prays this court to discharge the order to show cause and dismiss the bill of complaint herein, as prayed for in his motion." Thereupon the following decree was entered: "This cause coming on to be heard upon the application of the defendant, Joseph Swift, for leave to withdraw from his answer now on the files of this court paragraphs 13 and 14 thereof, and submit to a decree in plaintiff's favor on such terms as may be found equitable and just, and upon the order granted September 22, 1895, by the judge of this court, requiring the plaintiff or his solicitors to show cause why defendant should not be allowed to withdraw from his answer said paragraphs 13 and 14 thereof, and this cause be referred to the master in chancery of this court or some special master to be agreed upon between the parties, to take testimony and make an accounting between the parties to this suit touching the real property in controversy and the moneys paid out by defendant on ac-
370 count thereof and interest thereon, and the rents, revenues and returns received by defendant therefrom, and report the same to this court, or such other order be made in the premises as might be meet and according to equity; and the same being now heard before this court upon the petition of Joseph Swift, verified by his solicitor, Edwin Van Cise, upon which said order to show cause was based, and upon the resisting affidavit of the plaintiff, Donald A. McPherson, this day submitted and filed; and at the same time the complainant, by his solicitors, filing his motion in this court to dismiss his bill of complaint heretofore filed herein in this case, the complainant Donald A. McPherson, appearing by his solicitors G. C. Moody and E. W. Martin, and the defendant by his solicitor, Edwin Van Cise, and the court having heard the matters in controversy upon the affidavits aforesaid, and the bill of complaint, verified answer and replication, on file herein, and being fully advised in the premises, it is now ordered that the application of the defendant be and the same is hereby denied, and the order to show cause granted September 26, 1895, be and the same is hereby vacated and discharged. It is further ordered, considered, adjudged and decreed, that this suit and the bill of complaint, heretofore filed herein on behalf of the complainant and against the defendant, be and the same is hereby dismissed. It is further ordered and adjudged that defendant have and recover of and from the complainant, Donald A. McPherson, the costs of this suit, taxed at $30.30."

Notwithstanding the former action was upon the same claim or

demand, it is not a bar to the present action unless the former decree was rendered on the merits. Selbie v. Graham, 18 S. Dak. 365; Dewey v. Feiler, 11 S. Dak. 612; 24 Am. & Eng. Ency. Law.
371 794. A voluntary dismissal by the plaintiff is not a bar especially if expressed to be without prejudice. But the mere fact that the dismissal is not expressed to be "without prejudice" does not necessarily establish that the dismissal was a decision of the merits. 24 Am. & Eng. Ency. Law. 805. Though it is never permissible to introduce parol or other extrinsic evidence to vary or contradict a judicial record, where the record does not on its face show the precise question determined, or in other respects leaves any matter open to doubt, parol or other extrinsic evidence, which is not in conflict with the record, may be introduced to aid and explain it by showing the precise questions which were determined, or that certain questions were not passed upon, or otherwise clear up any doubts which might exist. Id. 193. In this instance, we think, the record shows on its face that there was no adjudication on the merits. If, however, this be not so, it is clear that the contrary does not appear and the court below erred in excluding parol evidence offered by the plaintiff to prove that there was not, in fact, any determination of the issues involved. Either view entitles the plaintiff to a new trial so far as the defense or res judicata, is concerned.

The contention that the record in the former action discloses a retraxit which precludes the plaintiff from maintaining the present action is not tenable, even if it be assumed, that anything of the sort is sanctioned by the rules of practice prevailing in this jurisdiction. At common law a retraxit is a voluntary acknowledgment that the plaintiff has no cause of action and therefore will not proceed further, made in open court by the plaintiff in person. 18 Ency. Pl. & Pr. 898. Though the return to the order to show cause was verified by the plaintiff, there is nothing in the record
372 to indicate that it was filed by the plaintiff in person, nor does it disclose any acknowledgment on his part that he had no cause of action. On the contrary the reasons assigned therein for declining defendant's offer impliedly assert the existence of his alleged cause of action and are not in the slightest degree inconsistent with an intention to further litigate his rights. The offer in plaintiff's complaint to pay a certain sum in consideration of having his claim to an undivided one-half interest in the remaining property recognized was not an essential element of his causes of action. He was, if the other allegations of his complaint were true, entitled to an accounting without any such offer or previous tender, and the withdrawal of the offer long after it had been refused was in no sense a renunciation of his right to insist upon an accounting.

What has been said regarding the alleged retraxit applies with equal force to the contention that "the acts and declaration of the plaintiff in procuring the decree of February 22, 1896, in the former suit, estop him from maintaining this action for the same relief he sought in that, and which he there asked and induced the court to deny." There is no conflict between the plaintiff's position in the former and present action. He did not "ask and induce the court

to deny" the relief sought by him in the former action. He merely declined to accept the defendant's offer and elected to withdraw his action which he had a perfect right to do, the defendant, not having pleaded a counterclaim. Moreover, the position of the defendant was not prejudiced. He was in possession of the property and its proceeds. If he desired a termination of his trust relation to the property he should have instituted an action in equity for
373 that purpose. The plaintiff is not estopped by his conduct. For the same reason he is not chargeable with such laches as should preclude him from maintaining the present action. It is alleged in the complaint and denied in the answer, (a material issue upon which no finding was made), that the plaintiff paid $5,005.00, for Miller's interest in the partnership property. If he did so he paid a substantial price for a substantial right and no reason appears why such right should not be enforced unless the plaintiff's cause of action be barred by some statute of limitation.

Clearly this is not an action on the contract embraced by the provisions of the six years' limitation. Rev. Code Civ. Proc. §60. It is an action in equity to ascertain and recover a deceased partner's interest in the ultimate distribution of partnership assets. Such assets, as between the defendant and the successor of his deceased partner, must be regarded as personal property held by the defendant in trust for the purpose of distribution according to the equitable rules governing such property. It is therefore, entirely clear that the limitation upon actions for the recovery or possession of real property, based on adverse possession or payment of taxes under color of title, have no application. The action is one for relief not specially provided for and must have been commenced within ten years after the cause of action accrued. Id. 66. A cause of action does not accrue until the party owning it is entitled to begin and prosecute an action thereon; it accrues at the moment when he has a legal right to sue on it and not earlier. 19 Am. & Eng. Ency. Law, 193. When the right of action to sue for the settlement of partnership affairs accrues, so as to set the statute of limitations in
374 motion, depends upon circumstances and cannot be held as a matter of law to arise at the date of the dissolution, or to be carried back by relation to that date. Riddle v. Whitehill, 135 U. S. 621; 34 Law. Ed. 282. Upon the dissolution of the partnership in this case, by the death of Miller, Swift, as surviving partner, succeeded to all the partnership property, whether real or personal, in trust for the purpose of liquidation. Rev. Civ. Code, §1761. Miller's personal representative, until otherwise informed, was justified in presuming that such trust was being faithfully performed, and neither he nor his successor in interest was entitled to sue for a settlement of the partnership affairs before making a demand or receiving notice of the trustee's renunciation of his trust. The following statement appears in the decision of the circuit court as a finding of fact: "Upon his death, the defendant Swift appointed A. W. Coe his agent to collect the rents and attend to the care and management of the property and has retained him since. Swift at once upon Miller's death asserted in good faith and under the advice of counsel

learned in the law, and has since continued so to assert, that he was the sole owner of the property, that if Miller had any interest in it, it terminated with his death, and said Swift has also since the date of said Miller's death denied that the estate of Miller had any interest whatever in said real property, and has all the time asserted an ownership and possession exclusive in himself and adverse to the estate to the whole of such real property—all this to the knowledge of the administrator, William Selbie, appointed June 1, 1892, and of the plaintiff, all the time a resident of Deadwood, Lawrence county, and familiar with defendant's possession and claim of title." These facts and conclusions do not support the contention that the statute of limitations began to run upon Miller's death. The
375 employment of a resident agent to collect rents and care for the property does not indicate an intention to apply the rents so collected otherwise than for the purposes of liquidation. It was Swift's duty as a surviving partner to employ an agent to care for the property if he was unable to care for it himself. Where and to whom did he assert that he was the sole owner of the property and that Miller's interest terminated with his death? Manifestly not to the administrator of Miller's estate prior to June 1, 1892, because there was none before that time. Assuming that notice of renunciation to plaintiff prior to his acquisition of Miller's interest would have set the statute running, it does not affirmatively appear that he had such notice and certainly it would be unreasonable to infer the existence of such notice before he acquired any interest in the property. After Miller's death there was, so far as the decision discloses, no representative of his estate who could have demanded a settlement or to whom notice of renunciation could have been given, before the appointment of Selbie. Therefore, no right of action accrued prior to June 1, 1892, and the present action, as found by the trial court, was begun June 18, 1901, less than ten years later.

None of the affirmative defenses having been established the failure to find whether the plaintiff acquired Miller's interest and to make an accounting—the failure to find upon all the material issues presented by the pleading was prejudicial error; or, if it be assumed as contended by respondent, that the only question properly presented by the record is whether the findings of fact sustain the conclusions of the circuit court, it must be held that they are insufficient for that purpose. The judgment and order appealed from are reversed.

376 In the Supreme Court of the State of South Dakota.

DONALD A. MCPHERSON, Respondent,

vs.

JOSEPH SWIFT and A. W. COE, Appellants.

*Petition for Rehearing, etc.*

To the Honorable the Supreme Court:

Now comes the defendant Joseph Swift, against whom judgment in the above entitled action was rendered by the trial court, which

was affirmed in this court on March 29, 1911, and respectfully petitions this Honorable Court for a re-hearing and modification of its opinion and decision filed March 29, 1911, and the withdrawal therefrom of the following language on the concluding page thereof, "though the assignments of error occupy 49 closely printed pages they no where specify any particular wherein the evidence was insufficient to justify this finding, (referring to the 5th finding of the trial court set out immediately preceding this language of the Court), nor does the appellants' printed brief, consisting of 166 pages, anywhere point out any particular in which the evidence is insufficient." And petitioner also asks that the following language in the last paragraph of said opinion be withdrawn, "assigned in appellants' abstract or discussed in appellants' brief in accordance with the statutes of this state and the rules and decisions of this court."

The grounds of this petition are that the court in making the foregoing statements overlooked the assignments of error made by counsel and set forth in the abstract of the record, and also urged in counsel's brief submitted to this court, in the following particulars:

## I.

1. Said finding No. 5 was excepted to by appellants, (Abst. p. 346, f. 1029).

2. Said finding was objected to and corrections suggested in their requests by defendants (Abst. p. 302, f. 897-8).

377 3. Defendants also objected to finding No. 2 on the same subject as to county court proceedings, (Abst. p. 300-1, f. 891).

4. Defendants also objected to finding No. 3 bearing upon the same question, (Abst. 301, f. 894).

5. Defendants also objected to finding No. 4 as to the necessity of sale of property by order of county court, (Abst. 302, f. 896).

6. Defendants also objected to finding No. 6 bearing upon proceedings in county court, (Abst. 303, f. 899-901).

7. Defendants also objected to finding No. 7 regarding the appeal and asked an amendment to it, (Abst. p. 303-4, f. 901-2).

8. Defendants also requested a finding, No. 26, on the question of county court proceedings in the matters referred to, which was rejected by the court, (Abst. 323, f. 961-3).

9. Defendants requested a further finding, No. 27, regarding these county court proceedings, which was rejected, (Abst. p. 324-6, f. 963-70).

10. Defendants also requested a finding, No. 28, based upon these county court proceedings, which was rejected by the court, (Abst. p. 327, f. 970-2).

11. Defendants also requested a finding, No. 29, with reference to the proceedings in the county court and instruments received in evidence, pointing out defects, which finding was rejected by the court, (Abst. 327-8, f. 972-6).

12. Defendants also requested a finding, No. 30, regarding the

conduct of the administrator, which was rejected by the court, (Abst. 328-9, f. 976-7).

13. Defendants also requested a finding, No. 31, based upon the proceedings in the county court, which was rejected by the court, (Abst. 329-30, f. 978-80).

14. Defendants also requested a finding, No. 32, seeking to amend the finding regarding the appeal of defendant Swift from the orders of the county court, which was rejected by the court, (Abst. 330, f. 980-1).

378 15. Defendants also requested a finding, No. 33, to the effect that no bond was given by plaintiff McPherson in county court, which finding was rejected by the court, (Abst. p. 330, f. 982).

16. Defendants also requested a finding, No. 35, regarding the appeal from the county court and the reason for its abandonment, which finding was rejected by the court, (Abst. p. 331-2, f. 985).

17. Defendants also requested a conclusion of law, No. 4, to the effect that the proceedings in the county court culminating in the deed were void for gross defects therein stated, which conclusion was rejected by the court, (Abst. p. 333, f. 990-91).

18. Defendants also requested a conclusion of law, No. 5, as to the effect of the absence of a statutory bond and the pendency of an appeal from the county court proceedings, which was rejected by the court, (Abst. p. 334, f. 992).

19. Defendants also requested a conclusion of law, No. 6, regarding the offer of administrator Selbie to collect rents, etc., and that it was without sanction of court or authority in the law, which conclusion was rejected by the court, (Abst. 334, f. 993).

20. Defendants also requested a conclusion of law, No. 7, as to the policy of the administrator in selecting only properties which seemed to have a profit in them and rejecting all others, which conclusion was rejected by the court, (Abst. p. 334-5, f. 994-5).

21. Defendants also requested conclusion of law, No. 8, as to the conduct of McPherson in abandoning other purchases and making varying estimates of value and that in this he showed the disposition on his part to maintain this controversy for speculative purposes and without equity.

22. Defendants also in their assignments of error specified all of the foregoing and particularly under the subdivision of insufficiency of the evidence (No. 5, p. 372) as follows:

23. The conduct of the administrator in his offer of services, (Abst. par. e, p. 374, f. 1112).

24. The conduct of Selbie with reference to these contracts
379 and the construction of his offer with reference thereto (Abst. par. f. p. 374-5, 1113-15).

25. The conduct of plaintiff in his proceedings in county court and since, as buying into a law suit and lacking in good faith, (Abst. par g, p. 375, f. 1115).

26. And especially the next allegation of insufficiency of the evidence covering the whole proceedings in County Court from the be-

ginning up to the time of the order for a deed, (Abst. par. h, p. 375, f. 1116-18).

27. And also the next ground referring to the elaborated description in the deed and lack of power to execute the same for want of a bond and during the pendency of an appeal, and alleging that the deed was void, (Abst. par. i, p. 376, f. 1118-20).

28. Defendants also raised these questions regarding the proceedings in the county court in assignments of errors under the subdivisions regarding the overruling of defendants' objections and rejecting defendants' requests, (Abst. par. c, p. 391, f. 1163-5).

29. Also regarding the necessity for a sale of property by county court, (par. d, p. 391-2, f. 1165-6).

30. Also further error assigned regarding proceedings in county court, (par. e-f, p. 392, f. 1166-8).

31. Also further assignment regarding the rejection of request for finding, (Abst. par. z, p. 399, f. 1188).

32. Likewise in a later paragraph (Abst. par. aa, p. 399, f. 1189).

33. Likewise in a later paragraph, (Abst. par. bb, p. 400, f. 1190).

34. Likewise in a later paragraph, (Abst. par. cc, p. 400, f. 1190-1).

35. Likewise in a later paragraph, (Abst. par. dd, p. 400, f. 1191).

36. Likewise in a later paragraph, (Abst. par. ee, p. 400, f. 1192).

37. Likewise in a later paragraph, (Abst. par. ff, p. 401, f. 1193).

380 38. Likewise in a later paragraph, (Abst. par. gg, p. 401, f. 1193-4).

39. Likewise in a later paragraph, (Abst. par. hh, p. 401, f. 1194).

40. The assignments of error under subdivision 24 as to rejected conclusions of law covered these proceedings in county court, the first of these referring to defendants' requests for conclusion No. 4, (Abst. par. d, p. 403, f. 1200).

41. The next of these is regarding defendants' request for conclusion No. 5, (Abst. par. e, p. 403, f. 1201).

42. The next of these is regarding defendants' request for conclusion No. 6, (Abst. par. f. p. 404, f. 1202).

43. The next of these is regarding defendants' request for conclusion No. 7, (Abst. par. g, p. 404, f. 1202-3).

44. The next of these is regarding defendants' request for conclusion No. 8, (Abst. par. h, p. 404, f. 1203-4).

## II.

It will be found also that in appellants' printed brief these county court proceedings were referred to very frequently;

1. Objection to finding No. 1 and its incompleteness regarding the qualification of executors, (par. 2, p. 58).

2. Objection to finding No. 4 and its recital as to the need to sell real estate by county court, (par. 4, p. 58-9).

3. Objection to the order of county court (finding No. 5) and the suggestions in offered amendments, (par. 5, p. 59).

4. Objection to finding No. 6 and the use of the word "duly" therein, etc., (par. 6, p. 59).

5. Objection to finding No. 7 and the recital that appeal was dismissed instead of abandoned, (par. 7, p. 59-60).

6. Again the subject was referred to in the brief in the reference to defendants' request for a finding as to the other purchases of interest in land contracts, (par. 27, p. 68).

7. It was again referred to in objection to the abbreviations
381 failing to describe the property, (par. 29, p. 69).

8. And again in the reference to the administrator's policy to claim dominion only over properties in which he saw a profit, (par. 30, p. 69).

9. And again to the varying estimates of value made by plaintiff in the county court proceedings, (par. 31, p. 69).

10. And again to the request for a finding regarding Swift's appeal and that the appeal was pending at the date of the administrator's deed. (par. 32, p. 69).

11. And again to the request for finding that no bond was given by plaintiff in county court, (par. 33, p. 69).

12. Reference to the county court proceedings is again found under the head of "requests for conclusions of law," (p. 70).

13. Particularly in the 4th request that the proceedings in county court were void for want of bond and other defects and Selbie had no authority to expand the description and the deed was void, (par. 4, p. 71).

14. And the request or conclusion No. 5 that want of statutory bond and pendency of an appeal made the deed of January 11, 1893 void, (par. 5, p. 71).

15. Again in the request for a conclusion regarding Selbie's conduct in seeking control of properties only in which he thought there was a profit, (par. 7, p. 72).

16. And again in request for a conclusion that plaintiff's conduct as to other purchases and failure to give proper bond in the county court proceedings, etc., etc., stamped his claim as speculative and wanting in good faith, (par. 8, p. 72).

17. Again under the second subdivision of our argument, insufficiency of the evidence (p. 79), reference was made to the different assignments of error, to the motion for non-suit, to the exception, to the order overruling the motion for new trial, and this point was emphasized, "the fatal defects in county court records culminating in the deed under which plaintiff claims, made while appeal was pending," (p. 79).

382 18. Again under the head "omitted findings," (p. 80) reference is made to plaintiff's requests No. 27 and 28, regarding the proceedings in county court (p. 84). And No. 29, as to the abbreviated descriptions (p. 84).

19. And again reference is made to defendant's requests Nos. 30, 31 and 32, regarding the same proceedings in county court (p. 83).

20. And again a special point is made that there was no bond given by plaintiff upon the confirmation of the sale and execution of administrator's deed and the refusal of defendants' finding or request No. 33, (p. 86).

21. Again under the head of "erroneous findings" the findings of

the lower court Nos. 5 and 6 are especially referred to as conclusions and the objections pointed out (p. 88-9).

22. And again under the head of "administrator's deed void" (p. 95) the evidence was referred to, the offered conclusions of defendant are referred to, the errors in description commented on, as well as the want of a bond, and the pendency of appeal, at the time the administrator's deed was made and South Dakota statutes and authorities cited upon all of these questions (p. 95-102). The Court must have overlooked this.

In view of the foregoing references to abstract and brief, we respectfully submit that the court has used the language referred to in the opinion, and which we here ask to have withdrawn, through some inadvertence or oversight. Perhaps the writer was guilty of too much elaboration and may be deserved such a criticism, and that he should not have undertaken to impose upon the court the examination of a brief of such length; but we respectfully submit that if the court will now simply refer to the objections hereinbefore cited it will find that not only was the finding of the trial court, No. 5, which is set out in the conclusion of the Court's opinion, objected to when made by the court, but specific objection filed thereto, and also requests for correction and amendment, and request for a substitute finding, and for a conclusion upon the effect of the evidence, and that argument was made upon these propositions in various parts of the brief as shown by the foregoing references.

383 We beg to say in answer to the court's suggestion that the various files and records from the county court were not objected to as offered, that we have understood the rule to be well settled in appellate courts that if evidence has gone in without objection of which there might be doubt as to the competency upon the face of it, it remains for the court to pass upon the weight and sufficiency of the evidence after it is in the record.

There is a difference between the admissibility of testimony and the question of its weight or value. An objection in improper form, or a failure to object entirely never precludes a party from denying the sufficiency of the evidence to establish a right to recover. The demurrer to evidence, or motion to non-suit, or request for a verdict, are all based upon this rule. And in equity, courts are wont to receive letters, contracts, deeds, judicial proceedings, corporate records, etc., without regard to objections whether made or not, and consider their weight and sufficiency in the argument on the merits. Cases can be cited without number illustrating these propositions. We name a few. The first states the rule, "Merely because a party does not object to the introduction of evidence does not preclude him from questioning its weight or sufficiency when admitted to establish a fact in issue."

Hill vs. Groesbeck, 29 Colo. 161, 166.
Roberts vs. Chan Tin Pen, 23 Calif. 260, 264.
Yates vs. Smith, 40 Calif. 662, 669.
Monford's Adm. vs. Rowland, 38 N. J. Eq. 181.
Rindskoff vs. Malone, 9 Iowa 542.

It will hardly be contended in this case that because we did not object to each instrument (some of which we wanted before the Court) we cannot now object and urge as in our brief, that successive steps taken were without jurisdiction, that a statute authorizing sale of a contract to purchase upon proper proceedings and giving of bond, is not complied with, by the proceedings here, where protest was made, a much better price offered, an order of confirmation of sale as of real estate, (described in abbreviations), and not of a contract to purchase, an omnibus undertaking referring to several
384 alleged purchases, but not in any sense the bond required by statute, and then an appeal taken and during its pendency an administrator's deed of real estate made instead of an assignment of contract, and an action brought to quiet title instead of specific performance. Such a strict construction would work great hardship and be in many cases a denial of justice. We confidently believe this Court will follow the more liberal precedent set in this case, upon the hearing of the first appeal, when the striking out of parol testimony offered to explain the federal judicial proceedings was made one of the grounds of reversal, though there was no exception in the Record (old Abst. p. 95, f. 283) and no assignment of error (Ibid. pp. 157-60).

We do not intend by urging the withdrawal from the opinion of the words quoted at the beginning of this petition, to waive our objections to other portions of it, and all parts of it, so far as it affirms the judgment and order appealed from. We respectfully ask a rehearing on the whole case and especially the "federal question," and a review of the cases cited in our brief, covering every phase of it, (Brief pp. 117-168), and especially the recent case of Railway Co. vs. McCabe, 213 U. S. 207. But as this Honorable Court has patiently considered several rather lengthy briefs from the writer on this question, both on the former appeal and on this, we desist from making further argument here.

We do urge most earnestly, however, that the Court withdraw from its opinion the language quoted, for it seems as it stands now a reflection on counsel for appellant that we do not think they deserve, and that we cannot believe this Court intends to cast upon us.

And we ask an early ruling on this petition, and in the event this Court overrules it, or whatever ruling it may make, we request that a stay of proceedings be entered that defendant may present his application for a writ of error with assignment of errors to His Honor the Presiding Judge within the time provided by law.

Respectfully submitted,

EDWIN VAN CISE,
FRANK L. GRANT,
PHILIP S. VAN CISE,
*Attorneys for Joseph Swift.*

385 *Order Denying Petition.*

And afterwards at a session of said Supreme Court held at its court rooms on May 22, 1911, the foregoing petition for a rehearing was considered by the court, and by the court overruled and denied.

386 In the Supreme Court of the State of South Dakota.

DONALD A. MCPHERSON, Plaintiff and Respondent,
vs.
JOSEPH SWIFT and A. W. COE, Defendants and Appellants.

*Petition for a Writ of Error.*

Now comes the above named Joseph Swift, defendant and appellant in this Court and prays that a writ of error in the above entitled cause may issue to said Supreme Court of the State of South Dakota, to review that certain final judgment entered in said Supreme Court of the State of South Dakota, on the 29th day of March, 1911, in favor of the said Donald A. McPherson, plaintiff and respondent, and against the said Joseph Swift, defendant and appellant, affirming that certain judgment rendered and entered in the Circuit Court of the Eighth Judicial Circuit of said State within and for Lawrence County on February 2, 1910, in favor of said plaintiff and respondent, for the reason that manifest error hath intervened in the rendition of said judgment in and by the said Supreme Court of the State of South Dakota, being the highest court in said State, to the great damage and injury of the said Joseph Swift, defendant and appellant as aforesaid. That the said errors of the said Supreme Court of the State of South Dakota, herein complained of, are particularly assigned and set forth in the Assignment of Errors herewith tendered and filed.

Wherefore, the said Joseph Swift, defendant and appellant as aforesaid, prays for the allowance of a writ of error to operate as a supersedeas upon the filing of a bond by him in the sum of twenty-five hundred dollars ($2,500.00), being the sum fixed by the Presiding Judge of this Court, and for such other process as may cause the said judgment rendered as aforesaid by the said Supreme
387 Court of the State of South Dakota, to be re-examined, reviewed and corrected by the Honorable the Supreme Court of the United States.

And your petitioner will ever pray.

JOSEPH SWIFT,
*Defendant,*
By EDWIN VAN CISE,
FRANK L. GRANT,
PHILIP S. VAN CISE,
*His Attorneys.*

387½ [Endorsed:] 2949. In the Supreme Court of the State of South Dakota. Donald A. McPherson, Plaintiff and Respondent, vs. Joseph Swift et al., Defendants and Appellants. Petition for writ of error. Supreme Court, State of South Dakota. Filed May 22, 1911. Frank Crane, Clerk.

388 In the Supreme Court of the State of South Dakota.

DONALD A. MCPHERSON, Plaintiff and Respondent,
vs.
JOSEPH SWIFT and A. W. COE, Defendants and Appellants.

*Assignment of Errors.*

Now comes the above named defendant Joseph Swift, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of South Dakota in the above entitled cause, there is manifest error, in this:

I.

1. The Court erred in affirming the judgment and decree of the trial court and its order overruling the motion for a new trial, and in its decision and opinion in that behalf, in overruling and denying the pleas of defendant Swift of retraxit and res adjudicata, and his claim under the constitution of the United States and the statutes and decisions, in bar of plaintiff's right to recover. That by defendant's pleas in bar there was drawn in question, (1) the validity of an authority exercised under the United States and the power and jurisdiction of the Circuit Court of the United States in and for the district of South Dakota, to render and enter its said decree in favor of defendant Swift, and the validity and effect of said decree as a final adjudication in his favor, and this court's decision was against its validity; (2) and there was also drawn in question the validity of an authority exercised by a circuit court of the State of South Dakota, to-wit, the trial court, and also of the Supreme Court being the highest court in said State, under and by virtue of their existence as courts of said State, to dispute and deny the force and effect of said decree of February 22, 1896, as a final adjudication in de-
389 fendant's favor, on the ground of such authority so exercised being repugnant to the constitution and laws of the United States, and the court's decision was in favor of the validity of the exercise of such authority; and (3) there was also a title, right, privilege and immunity claimed by defendant Swift under the constitution of the United States, to-wit, under section X of Article I, section 1 of Article IV, and the Amendments Article V and Article XIV, and the decision was against the title, right, privilege and immunity so claimed by said defendant Swift under such constitution, and this court by its adverse decision upon said questions and the claims of defendant Swift, (*a*) impaired the obligation of said judgment and decree of February 22, 1896, as a contract in violation of section X of Article I of said Constitution, and (*b*) denied to said judgment and decree and the judicial proceedings leading up to and merging in the same, the full faith and credit to which they were entitled in the trial court, and in the appellate court, under section 1 of Article IV of said Constitution, and (*c*) deprived de-

fendant Swift of his property, to-wit, said judgment and decree of February 22, 1896, and the full force and effect thereof as a final adjudication, estoppel and bar, without due process of law, against the provisions of Article- V and XIV of the amendments to said Constitution, and (*d*) denied to said defendant Swift the equal protection of the laws guaranteed to him by Article XIV of the amendments to said Constitution. And the Court erred in and throughout its said judgment, decision and opinion, for all the foregoing reasons in sundry and several statements, decisions, and judgments, as follows, to-wit:

2. The Court erred in that while it recognized a paragraph in defendant Swift's separate answer as "evidently intended to preserve a federal question for review by the United States Supreme Court, concerning the effect to be given the proceedings in the United States Circuit Court," nevertheless its said decision and its judgment of affirmance were against the federal question so raised.

390 3. The Court erred in repeating and reiterating the language of its former decision and holding in regard to the evidence in the case "that none of the alleged affirmative defenses had been established."

4. The Court erred in that while by its decision and in its opinion affirming the judgment and decree of the trial court, it declared that "the only questions now open to discussion are whether plaintiff acquired Miller's interest, the extent of the same, and the effect of the proceedings in the federal court," and thus recognized the existence of the "federal question" in the record, yet by its decision and affirmance aforesaid the court held in express terms, and in necessary effect against such federal question.

5. The Court erred in reiterating the language of its former decision and holding in regard to the judicial proceedings in the United States Circuit Court, "In this instance, we think the record shows on its face that there was no adjudication on the merits; if, however, this be not so, the contrary does not appear."

6. The Court erred in reaffirming and reiterating its former decision, that "upon the first trial the court below erred in excluding parol evidence offered by the plaintiff to prove that there was not in fact any determination of the issues involved (meaning in the case in federal court); either view entitles plaintiff to a new trial so far as the defense of res adjudicata is concerned;" and in stating and deciding in connection with this, "whether right or wrong, the conclusions thus stated in the certified copy of the opinion of this court, required to be transmitted to the trial court when the same was remanded, expressed the law of the case which the trial court was bound to follow on the second trial," and that, in and by such decision the Court sanctioned, approved, and authorized the admission of parol testimony seeking to impeach, contradict and discredit a judgment and decree of the federal court pleaded in this action, and the judicial proceedings and records of said court in the action in which said decree was rendered.

391 7. The court erred in approving and adopting the finding of the trial court and holding "that no evidence, testimony

or proof was ever taken or submitted in said action upon the hearing of said motion of the defendant Joseph Swift for leave to withdraw from the answer of said Joseph Swift paragraphs 13 and 14 thereof, and submit to a decree in plaintiff's favor, nor upon the hearing of said motion of the said complainant Donald A. McPherson, for leave to dismiss his bill of complaint in said action, and that there was no hearing or trial in said action in said United States Court upon the merits,"—for that this contradicts the recitals of the judgment and decree referred to.

8. The Court erred in that while it admits that "plaintiff testified he was present in open court during the proceedings which resulted in the dismissal of the former action," it qualifies this admission by the statement, "At common law a retraxit is a voluntary acknowledgment that the plaintiff has no cause of action and therefore will not proceed further, made in open court by the plaintiff in person; though the return to the order to show cause was verified by the plaintiff there is nothing in the record to indicate that it was filed by the plaintiff in person," as the court thereby seeks to limit the force and effect of the affidavit of plaintiff and of his conduct in court as a retraxit, and to contradict the recitals in finding of fact No. 13.

9. The Court erred in holding of and concerning the verified return of plaintiff in the United States Circuit Court, "nor does it disclose an acknowledgment on his part that he had no cause of action; on the contrary the reasons assigned therein for declining defendant's offer impliedly assert the existence of his alleged cause of action, and are not in the slightest degree inconsistent with an intention to further litigate his rights,"—for that, the court thereby seeks to limit the force and effect of said verified return of plaintiff, and to dispute the construction given to it by said federal court as an election of remedies and also a retraxit.

10. The Court erred in holding that (referring to the judicial proceedings in federal court and the bill of complaint there
392 filed by plaintiff and his verified return to the order to show cause), "The offer in plaintiff's complaint to pay a certain sum in consideration of having his claim to an undivided one-half interest in the remaining property recognized, was not an essential element of his cause of action. He was, if the other allegations of his complaint were true, entitled to an accounting without any such offer or previous tender, and the withdrawal of the offer long after it had been refused was in no sense a renunciation of his right to insist upon an accounting,"—for that the court thereby disputes the force and effect of the judicial proceedings in the United States Circuit Court merging in its decree of February 22, 1896, and said Court's construction of plaintiff's bill of complaint there filed and of the contract of May 8, 1888, and of the affidavits, and of plaintiff's acts and conduct in the premises.

11. The Court erred in its allusion to the federal question and the contentions of defendant Joseph Swift and his attorneys in that regard, in stating and holding, "It was suggested during the oral argument, though the question was not presented by the record,

that the removal of the former action into the United States Court, deprived the state court of jurisdiction of the subject matter, such former action not having been remanded to the state court,"—for that in and by said statement the court treated the federal question as one of jurisdiction and disregarded the defendant's pleas of retraxit and res adjudicata in his answer, and also his offered conclusions of law in support thereof, and also the plaintiff's 13th finding of fact.

12. The Court erred in holding of and concerning the same question, "Such conclusion could not be sustained even on the assumption that the question was properly presented and not determined by the decision of this court on the former appeal," and thus deciding the federal question adversely to defendant Swift.

13. The Court erred in holding, "Therefore the trial court correctly decided that plaintiff was not precluded from maintaining the present action by reason of the proceedings in the United
393 States Circuit Court."

14. The Court erred in its holding regarding the proceedings in the County Court, that in the absence of objections to evidence when introduced the legal force and effect thereof could not be considered, and in approving and sustaining the trial court's finding of fact No. 5 concerning such proceedings and stating that no assignment of error was directed thereto, thus disregarding the exception to such finding and the offered conclusions of defendant Swift, and also disregarding the fact that issues upon these proceedings in County Court were made in the pleadings in federal court, and the questions were there decided adversely to plaintiff's contention and to the finding made by the trial court.

15. The Court erred in holding, "Having found no reversible error in law occurring at the trial, or particular in which the evidence is insufficient to justify the decision of the Circuit Court, the judgment and order appealed from are affirmed."

16. The Court erred in and throughout the whole and each and every part of its judgment of affirmance and its decision and opinion of March 29, 1911, in each, every and all of the statements, conclusions and holdings adverse to this defendant therein.

17. The Court erred in affirming the decision of the trial court and thereby holding that said trial Court's interpretation and construction of the federal court's judicial proceedings and its decree of February 22, 1896, adversely to said Swift's contention and his pleas of retraxit and res adjudicata did not impair the obligation of the contract created in defendant's behalf by said decree.

18. The Court erred in affirming the decision of the trial court and thereby holding that said trial court's interpretation and construction of said federal court's judicial proceedings and its decree of February 22, 1896, did not deny to said judicial proceedings and decree the full faith and credit to which they were entitled under the Constitution of the United States.

19. The Court erred in affirming the decision of the trial
394 Court and thereby holding that said trial court's interpretation and construction of said federal court's judicial proceed-

ings and its decree of February 22, 1896, did not deprive defendant Swift of his property without due process of law.

20. The Court erred in affirming the decision of the trial court and thereby holding that said trial court's construction and interpretation of said federal court's judicial proceedings and its decree of February 22, 1896, did not deny to defendant Swift the equal protection of the laws.

21. The Court erred in holding that the federal question was only suggested by some one as a question of jurisdiction and was not raised in the record by defendant's pleas in his answer.

II.

22. The Court erred in affirming the judgment of the trial court, and approving its findings of fact,—for that thereby it adopted sundry findings to a great extent in conflict with and contradiction of the finding No. 13, in which are set forth the judicial proceedings in the United States Circuit Court merging in the decree of February 22, 1896, and in which findings (aside from finding No. 13) sundry matters and things are recited as facts which were in issue in said federal court judicial proceedings and there decided and adjudged adversely to the contentions of plaintiff, and to the recitals of said findings other than finding No. 13, and said findings thus constituted a denial to defendant Swift of his title, rights, privileges and immunities claimed in this action and were a violation of the constitutional provisions aforesaid. And for all these reasons each of said several findings, except No. 13, and occasional sentences elsewhere are prejudicial to defendant and erroneous.

23. The Court erred in affirming the judgment of the trial court and approving its finding of fact No. 1, so far as such finding stated there was no misrepresentation on the part of Miller in procuring the contract of May 14, 1888, and no profit made by Miller from the seller of the property, and that the allegations of paragraphs fourteen and fifteen of defendant Swift's answer, being para-
395 graphs thirteen and fourteen of his answer in federal court, are untrue.

24. The Court erred in affirming the judgment of the trial court and approving its finding of fact No. 2, referring to Joseph Swift as an executor when he was also a trustee under the will with two associates, and also the statement in said finding that Selbie by virtue of his appointment as administrator was vested with the Miller interest in the property in controversy.

25. The Court erred in affirming the judgment of the trial court and approving its finding of fact No. 3, that the possession of Swift of the property in controversy from the time of Miller's death January 12, 1891, to the date of Swift's removal as executor was a possession as executor and trustee.

26. The Court erred in affirming the judgment of the trial court and approving its finding of fact No. 4, so far as it states it became and was necessary to sell the property in controversy.

27. The Court erred in affirming the judgment of the trial court

and approving its findings of fact Nos. 5 and 6, setting forth the proceedings and orders of the County Court and an attempt of the administrator not only to assign and transfer an alleged interest in the Miller estate in the contract of May 14, 1888, but also to convey its alleged interest in the real property referred to in said contract, and to execute a deed therefor to plaintiff, not authorized by law, and while an appeal from the court orders was pending to a higher court as recited in the finding No. 7.

28. The Court erred in affirming the judgment of the trial court and approving its finding of fact No. 8, so far as it stated that Selbie, the administrator, was not directly or indirectly interested in the alleged purchase by plaintiff McPherson at a so-called administrator's sale.

29. The Court erred in affirming the judgment of the trial court and approving its findings of fact Nos. 9, 10 and 11, alleging a joint ownership, and attempting to state an account between plaintiff and defendant, in view of finding No. 13 and the allegations of
396 the plaintiff's complaint.

30. The Court erred in affirming the judgment of the trial court and approving its finding of fact No. 14, to the effect that no evidence, testimony or proof was taken in the federal court upon the hearing of the motions on February 22, 1896.

31. The Court erred in affirming the judgment of the trial court and approving its finding of fact No. 15, to the effect that plaintiff McPherson did not in the action in Federal Court renounce his claim or cause of action, and that the dismissal of his bill of complaint was not a bar to the present suit.

32. The Court erred in affirming the judgment of the trial court and approving its finding of fact No. 16, to the effect that plaintiff McPherson did not disavow or disclaim any interest in the property in controversy and that there was no enhancement in value of the property and that plaintiff had not abandoned his interest nor been guilty of laches in asserting his claim.

33. The Court erred in affirming the judgment of the trial court and approving its finding of fact No. 17 as to the nature of defendant Swift's possession of the property in controversy and his collection of revenues therefrom and payment of taxes thereon.

34. The Court erred in affirming the judgment of the trial court and approving its finding of fact No. 18, reciting that the allegations of plaintiff's complaint were true and the allegations of defendant's answer (except where specifically found) were untrue.

35. The Court erred in affirming the judgment and approving the findings of fact of the trial court for that the court failed to find upon some of the material issues raised and presented by the pleadings; and the findings as set forth are in many instances in conflict with and contradiction of each other and especially with finding No. 13, and taken as a whole they do not support the conclusions of law nor the judgment.

## III.

36. The Court erred in affirming the judgment of the trial
397 court and approving its conclusions of law, for that the complaint in the action does not state facts sufficient to constitute a cause of action nor to support a judgment, and that the findings of fact as a whole, in view of the judicial proceedings set forth in finding No. 13, do not support these conclusions, and the conclusions constitute a decision adverse to defendant's pleas and claims set up in his answer, and a denial of his title, rights, privileges and immunities as aforesaid.

37. The Court erred in affirming the judgment of the trial court and approving its conclusion of law No. 1, awarding plaintiff a money judgment against defendant Swift.

38. The Court erred in affirming the judgment of the trial court and approving its conclusion of law No. 2, adjudging plaintiff the absolute owner in fee of an undivided one-half interest in the unsold portions of the real property described in plaintiff's complaint.

39. The Court erred in affirming the judgment of the trial court and approving its conclusion of law No. 3, perpetually enjoining and restraining defendant Swift from asserting any right, title or interest in or to said undivided half of said property.

## IV.

40. The Court erred in affirming the judgment of the trial court, and approving its rejection of the defendant's offered conclusions of law, for that they correctly stated the law and were based upon the laws of South Dakota, and the pleadings, evidence and proper findings of fact, and especially the court's finding No. 13 and the judicial proceedings set forth therein; and by reason of the court's approving the rejection of such offered conclusions of law defendant Swift was denied the benefits and advantages of the decree of February 22, 1896, and of the titles, rights, privileges and immunities set up and claimed by him in his answer, and deprived of his rights under the provisions of the Constitution of the United States aforesaid.

41. The Court erred in approving the decision of the trial court and affirming its judgment, for that thereby it approved the
398 rejection by said trial court of defendant's offered conclusion of law No. 1, as to the title of defendant Swift in the property in controversy.

42. The Court erred in approving the decision of the trial court and affirming its judgment,—for that thereby it approved the rejection by said trial court of defendant's offered conclusion of law No. 2, as to the proper construction of the contract of May 14, 1888.

43. The Court erred in approving the decision of the trial Court and affirming its judgment, for that thereby it approved the rejection by said trial court of defendant's offered conclusion of law No. 3, as to the repudiation by defendant Swift of said agreement of May 14, 1888, on and after January 12, 1891, and the repudiation

thereof by plaintiff by his declarations, acts and conduct in federal court on February 22, 1896, and thereafter.

44. The Court erred in approving the decision of the trial court and affirming its judgment, for that thereby it approved the rejection by the trial court of defendant's offered conclusions of law Nos. 4, 5, 6, 7 and 8, regarding the proceedings in county court and the conduct of plaintiff.

45. The Court erred in approving the decision of the trial court and affirming its judgment, for that thereby it approved the rejection by the trial court of defendant's offered conclusion of law No. 9, declaring the legal effect of defendant's possession and the relation of Miller as his agent. .

46. The Court erred in approving the decision of the trial court and affirming its judgment, for that thereby it approved the rejection by the trial court of defendant's offered conclusion of law No. 10, stating that the proper construction and legal effect of the contract of May 18, 1888, was an issue before the United States Circuit Court on February 22, 1896, and that in and by its decree of that date, said contract was construed adversely to the contention of plaintiff and favorably to defendant Swift.

399 47. The Court erred in approving the decision of the trial court and affirming its judgment, for that thereby it approved the rejection by the trial court of defendant's conclusion of law No. 11, declaring the value as evidence in the United States Court of defendant's verified answer, and the consideration necessarily given it in its judicial proceedings and in the entry of the decree of February 22, 1896.

48. The Court erred in approving the decision of the trial court and affirming its judgment, for that thereby it approved the rejection by the trial court of defendant's offered conclusion of law No. 12, declaring the acts, declarations and conduct of plaintiff in the federal court, in the proceedings culminating in the decree of February 22, 1896, to constitute a deliberate choice and election of remedies on plaintiff's part with full knowledge of his rights and of the facts, and which election barred plaintiff from maintaining this action.

49. The Court erred in approving the decision of the trial court and affirming its judgment, for that thereby it approved the rejection by said trial court of defendant's offered conclusion of law No. 13, declaring that plaintiff's filing of his verified application to dismiss his action in federal court February 22, 1896, was a retraxit and renunciation, and constitutes a bar to the maintenance of the present action.

50. The Court erred in approving the decision of the trial court and affirming its judgment, for that thereby it approved the rejection by said trial court of defendant's offered conclusion of law No. 14, declaring that the decree of February 22, 1896, was a final adjudication upon the merits and constitutes a bar to the maintenance of the present action.

51. The Court erred in approving the decision of the trial court and affirming its judgment, for that thereby it approved the rejection by the trial court of defendant's offered conclusion No. 17, to

the effect that there was a federal question involved, to-wit,
400 the construction and legal effect of the decree of February 22, 1896, and that by the decisions of federal courts and the terms of the decree, to which full faith and credit should be given in the State Court, said decree must be held a final adjudication and bar to the maintenance of this action.

52. The Court erred in approving the decision of the trial court and affirming its judgment, for that thereby it approved the rejection by the trial court of defendant's offered conclusion No. 18, to the effect that plaintiff had been guilty of laches and his claim was stale and wanting in equity.

53. The Court erred in approving the decision of the trial court and affirming its judgment, for that thereby it approved the rejection by said trial court of defendant's offered conclusion No. 21, denying plaintiff's right to recover and declaring that a judgment and decree should be entered in favor of defendants for a dismissal of the complaint and cause of action upon the merits and at plaintiff's costs.

## V.

54. The Court erred in approving the decision of the trial court and affirming its judgment and decree, for that thereby it approved its findings of fact and conclusions of law constituting said decision, when said findings and each and every of them saving and excepting only the finding No. 13, and the first sentence of No. 11, the first sentence of No. 7, and a few isolated sentences elsewhere were erroneous, and when said conclusions and each and every of them were erroneous and operated to impair the obligation of defendant's contract, to-wit, the judgment and decree of February 22, 1896, and to defeat his contractual rights, and also to deny to the federal judicial proceedings of February 22, 1896, the full faith and credit to which they were entitled; and also to deprive defendant of his property without due process of law; and also to deny to defendant the equal protection of the laws.

401 55. The Court erred in affirming the judgment of the trial court whereby the sum of eleven thousand and seven hundred and eleven dollars and eighty-one cents ($11,711.81) was awarded to plaintiff against the defendant Swift, for that said judgment was not supported by the complaint in the action, nor by the findings of fact nor by the conclusions of law, and was contrary to said findings of fact and any and all proper conclusions of law.

56. The Court erred in approving and affirming the judgment of the trial court, wherein and whereby it was decreed that plaintiff Donald A. McPherson was the absolute owner in fee of an undivided half of the certain real property there described, and defendant Joseph Swift was perpetually enjoined and restrained from claiming or asserting any right, title or interest therein or in any part thereof, and from interfering in any wise with the same or with the rents and income thereof, for that such judgment and decree was not supported by the allegations of the complaint in the action, nor by the decision of the court, to-wit, its findings of fact and conclusions of law, but was contrary thereto and in conflict therewith,

and the court was without jurisdiction to render such a judgment and decree.

57. The Court erred in approving the decision of the trial court, to-wit, its findings of fact and conclusions of law, and affirming its judgment and thereby approving the action of the trial court in overruling all defendant's objections thereto and his requests for amendment and correction thereof, and in rejecting his offered findings and conclusions.

58. The Court erred in its judgment of March 29, 1911, affirming the judgment of the trial court as aforesaid, for that therein and thereby in express terms and necessary effect the court decided the federal questions raised against the defendant Joseph Swift, and denied to him the rights, privileges and immunities claimed by him under the Constitution and laws of the United States and such decision and judgment was not based on any independent ground not involving a federal question broad enough to maintain
402 the same, nor was it possible to render a judgment against the defendant Swift without passing upon the federal questions raised by him and deciding the same adversely to him.

59. The Court erred in its said judgment and decision and in holding adversely to defendant Swift upon the pleas, claims and defenses set forth and asserted by him.

60. The Court erred in not reversing the decision and judgment of the trial court and either directing a decree in defendant's favor or awarding him a new trial.

And for and on account of the foregoing errors and divers and sundry others appearing upon the face of the record, the defendant Joseph Swift prays a writ of error may be awarded him to the end that the decision and judgment of this Court in this cause may be taken to the Supreme Court of the United States and there be re-examined, reviewed and reversed.

EDWIN VAN CISE,
FRANK L. GRANT,
PHILIP S. VAN CISE,
*Attorneys for Defendant Joseph Swift.*

402½–409 [Endorsed:] 2949. In the Supreme Court of the State of South Dakota. Donald A. McPherson, Plaintiff and Respondent, vs. Joseph Swift and A. W. Coe, Defendants and Appellants. Assignment of errors. Supreme Court, State of South Dakota. Filed May 22, 1911. Frank Crane, Clerk.

410 In the Supreme Court of the United States.

JOSEPH SWIFT, Plaintiff in Error,
vs.
DONALD A. MCPHERSON, Defendant in Error.

*Joinder in Error.*

Comes now said Donald A. McPherson, the defendant in error, this 20th day of July, A. D. 1911, by his attorneys, Norman T.

Mason and Chambers Kellar, and says there is no error either in the record of proceedings aforesaid or in the giving of the judgment by the Supreme Court of South Dakota here complained of, and he prays that this Supreme Court of the United States may proceed to examine as well the record and proceedings aforesaid as the matters assigned for error by plaintiff in error and that the judgment aforesaid may be in all things affirmed.

July 20th, 1911.

NORMAN T. MASON,
CHAMBERS KELLAR,
JAMES G. STANLEY,
*Attorneys for Donald A. McPherson, Defendant in Error.*

Residence and Post office address of Norman T. Mason is Deadwood, South Dakota.

Residence and Post office address of Attorneys Chambers Kellar and James G. Stanley is Lead City, South Dakota.

411 [Endorsed:] In the Supreme Court of the United States Joseph Swift, Plaintiff in Error, vs. Donald A. McPherson, Defendant in Error. Norman T. Mason and Chambers Kellar, Attorneys.

412 No. 751.

In the Supreme Court of the United States.

JOSEPH SWIFT, Plaintiff in Error,
vs.
DONALD A. MCPHERSON, Defendant in Error.

*Statement of Errors on which Plaintiff Will Rely and Parts of the Record Necessary for the Consideration thereof.*

Now comes Joseph Swift, the plaintiff in error in the above entitled cause, and states, pursuant to subdivision 9 of Rule 10 of this Court, that the errors on which he intends to rely are those set out in detail and filed in the Supreme Court of South Dakota with the petition for a writ of error, and which form a part of the record here.

The parts of the record which said plaintiff in error thinks necessary for the consideration of said errors are as follows:

Complaint of Donald A. McPherson plaintiff in the action as brought.

Answer of Joseph Swift, defendant in said action.

Decision of the trial Court (findings of fact and conclusions of law), with the exceptions noted thereto and allowed by the Judge.

Objections filed to the conclusions of law by the defendant Swift, together with offered conclusions Nos. 1 to 21 inclusive, and the order overruling and rejecting the same and exceptions noted and allowed.

Motion for new trial.
Order denying same with exception.
Judgment and decree of the trial court.
Notice of appeal to State Supreme Court.
413 Judgment of affirmance by said Supreme Court.
Opinion of State Supreme Court March 29, 1911.
Former opinion of said Court April 9, 1908.
Petition for rehearing.
Order denying the same.
Assignment of errors filed in State Supreme Court with petition for writ of error, and now in the record here, and on which plaintiff in error relies.
Joinder in error by defendant in error McPherson.

WILLIAM H. BECK,
1403 *H St., Washington, D. C.;*
EDWIN VAN CISE,
918-20 *Equitable Building, Denver, Colorado;*
FRANK L. GRANT,
(*Same Address*);
PHILIP S. VAN CISE,
(*Same Address*),
*Attorneys for Plaintiff in Error.*

Service of the foregoing statement is hereby admitted, by copy duly received at our office in Lead City, South Dakota, this 9th day of October, A. D. 1911, together with a copy of the assignment of errors referred to therein.

MARTIN & MASON,
CHAMBERS KELLAR,
*Attorneys for Defendant in Error.*

414 [Endorsed:] File No. 22,827. Supreme Court U. S., October Term, 1911. Term No. 751. Joseph Swift, Pl'ff in Error, vs. Donald A. McPherson. Specification of errors relied on and designation by plaintiff in error of parts of record to be printed, and proof of service of same. Filed October 18, 1911.

415 No. 751.

In the Supreme Court of the United States.

JOSEPH SWIFT, Plaintiff in Error,
vs.
DONALD A. MCPHERSON, Defendant in Error.

*Statement and Designation of Additional Parts of the Record which Defendant in Error Thinks Material.*

Now comes Donald A. McPherson, defendant in error in the above entitled cause, and pursuant to subdivision 9, of Rule 10, of this Court, designates the following additional parts of the record in this

cause which he thinks material, and which he requests shall be printed as a part of the record upon which the writ of error herein should be heard, to-wit:

(1) The following portions of the testimony of Edwin Van Cise, witness in behalf of the defendant, as the same appears in the bill of exceptions upon the following enumerated pages of said bill of exceptions, said testimony also appearing in the printed abstract (except as to the form of certain objections) upon the respectively enumerated pages of said abstracts as follows, to-wit:

EDWIN VAN CISE, on behalf of defendant, testified as follows:

"I reside in Denver, Colorado. I resided in Deadwood, South Dakota from March, 1879, to August, 1900. (Bill of Exceptions, P. 101, Printed Abstract, P. 240).

Q. The case which has been spoken of here as the case of D. A. McPherson vs. Joseph Swift, formerly pending in the Federal Court, Western Division of South Dakota, did you have any knowledge of that case?

A. I was attorney for the defendant, Joseph Swift, from the time that case was brought. I practiced law during the whole of my residence in South Dakota and Dakota Territory, from 1879 to 1900, and have been practicing attorney in Denver since that time.

Q. You have been connected with this litigation since its inception?

A. Yes sir, from the beginning of the case I was attorney for Joseph Swift. That is the one in which the files and judgment roll and record were introduced in evidence yesterday.

416 Q. Have you the judgment roll or record of that Federal Court case?

A. Yes in my hands at present.

Q. I notice there is a decree there dismissing that action; have you that with the papers?

A. Yes sir.

* * * * * * *

Q. There is in evidence a proceeding brought by the defendant in that case for an order to show cause, and order discharging that order. How does it come that the words, "Let decree be entered accordingly," are appended to that order?

By Mr. KELLAR: Objected to for the reason that it is immaterial, incompetent and irrelevant. It is incompetent as tending to vary by parol the record of the United States Court, which the Supreme Court of South Dakota in this case on previous appeal has already held to be not ambiguous and to show upon its face conclusively that it was a dismissal not on its merits; and if such testimony is not offered for such purpose then it is wholly immaterial and irrelevant.

Objection overruled; exception.

(Bill of Exceptions, P. 102; Printed Abstract, pp. 241-242).

The witness then answered: The order to show cause was obtained upon my application; and then upon the hearing, after argument

by Judge Moody and myself, the Court made a ruling that he would——

By Mr. KELLAR: Plaintiff objects to witness testifying as to the ruling of the court for the reason that the order itself shows what the ruling was, and it is not ambiguous, and for all of the reasons and all of the grounds urged in the last objection, and because the record which has already been introduced by defendant, and which the witness now holds in his hands, is the best and only evidence.

Objection overruled; exception.

The witness then continued: After the argument the court denied our application contained in the affidavit upon which the order to show cause was based, and said that he would grant a dismissal of the action. This Judge Moody prepared—at least he brought into court the next morning (the 22nd day of February)—the order in which the words are written in pen, referred to in your first question. When the order was brought into court, those words in pen were not contained in it. Judge Thomas took the order and looked at it and said: "You can add these words, Judge Moody, "Let decree be entered accordingly"; and Judge Moody said "It is not to be a final matter?" or something like that. And Judge Thomas said: "O, yes, we want an end made of this matter right now" or words to that effect. Judge Moody then wrote those words in: "Let decree be entered accordingly." Judge Thomas inserted the date and signed his name.

By Mr. KELLAR: Plaintiff's counsel not having an opportunity to object to various matters contained in the witness' answer, because not responsive to the question, now moves to strike out the answer of the witness as not responsive to the question so far as it pertains to anything said by Judge Thomas. Plaintiff also as a separate motion moves the court to strike out all of the testimony of the witness given in response to the last question upon all of the grounds and for all the reasons stated in previous objection.

Both motions overruled; exception.

(Bill of Exceptions, P. 103; Printed Abstract, P. 242.))

* * * * * * *

On cross-examination by Mr. Mason, the witness testified as follows:

Q. Where was this order signed by Judge Thomas?

A. In the then place of meeting of the Federal Court. I think it was the City Hall, at the corner of Main and a cross street, on the second floor.

Q. Was it a morning or afternoon session of the court?

A. My recollection would be that the order was signed in the morning. I am not sure.

(Bill of Exceptions, P. 104; Printed Abstract, P. 244.)

417 I notice the return to the order to show cause was verified by Mr. McPherson February 19th and was filed on the 22nd. It may be from that that the order I refer to bearing date the same

day was signed at the afternoon hour and then my decree before adjournment that day.

Q. Where was this decree signed?

A. City Hall building, Federal Court room in open court.

Q. You think on the afternoon of the same day the order was signed?

A. Yes.

Q. Who was present when this colloquy took place between Judge Thomas, Judge Moody and yourself?

A. I do not know that any one of the parties was present except Judge Moody and myself, besides Judge Thomas. Mr. McPherson might have been present when the argument was made on the return to the order to show cause. I am not sure whether that was made on that day or on the day before. I do not think he was present, nor Mr. Martin present, when the order I refer to was signed or the decree was signed.

Q. Mr. E. W. Martin was associated with Judge Moody as attorney for the plaintiff D. A. McPherson?

A. Yes sir.

Q. And had been associated as one of the attorneys for the plaintiff in that case from its commencement?

A. Yes; but in this proceeding, at the end, Judge Moody took the active part.

Q. At which one of these sessions, now, do you say that this conversation took place, in which Judge Thomas is claimed to have said he would not insert the words, "Without prejudice," because he wanted to have an end of the litigation, and would not insert the words, "On the merits" because it was not necessary under the practice; was that at the time the order was signed in the morning, or subsequently at the time the decree was signed?

A. It was both at the time the order was signed and when the decree was signed.

Q. The matter then came up twice?

A. Yes sir.

Q. Why did you suggest to the judge the desirability of having the words "upon the merits" put in the decree in the afternoon, if the judge had already told you he would not do it, in the morning?

(Bill of Exceptions, P. 105; Printed Abstract, pp. 244-245-246.)

A. I would not be sure about the morning and afternoon. Both might have occurred in the afternoon.

Q. I ask you why you asked to have it done, if he had in the morning refused—saying it was not necessary to be done?

A. When the order of dismissal was signed it was Judge Moody made the request. He submitted that order as it was, and when Judge Thomas said to add the words "Let decree be entered accordingly" Judge Moody wanted to add "Without prejudice" and Judge Thomas said, "O, no, this is to be a final disposition of this matter." Then I said "I can draw the decree and insert the words 'on the merits.' "No" he said "It is not necessary." When I presented it

for his signature he said "This is all you can ask." I said "No, we would much rather have had Mr. McPherson for a partner. If this decree is to be entered I would rather have the words "on the merits" in. He said "It is not necessary. Look at your Federal decisions."

Q. You did not call the court's attention to the fact that the customary decree in Federal courts in an equity case where there is a dismissal upon the merits is in the language that the bill is without equity?

A. No.

Q. And you did not suggest that in lieu of the words "upon the merits" ordinarily used in practice in state courts, the words equivalent thereto in Federal practice,—"the bill being without equity?"

A. No.

Q. He did not suggest that?

A. No sir.

Q. Or "the court finding there is no equity in the bill?"

A. No.

Q. You were familiar with the equity practice at that time?

A. Not very familiar with the Federal court practice I must say.

Q. As I understand it Judge Moody prepared the order?

A. Yes sir.

Q. And you subsequently prepared the decree?

A. Yes, I did.

418 Q. Did that question as to the phraseology of the order to be drawn, whether the order was to be a dismissal upon the merits or without prejudice come up at the conclusion of the argument?

A. No, it came up first when the order was presented.

(Bill of Exceptions, P. 106; Printed Abstract, pp. 246-247.)

Q. At the conclusion of the argument, then, there was simply a decision by his Honor, Judge Thomas, that he would grant the motion of the plaintiff which had just been argued and which is presented in this judgment roll you have offered in evidence and you now hold in your hands?

A. His oral decision was to deny my application and grant Judge Moody's application to dismiss. I am not sure as to the matter of time; that might have been the day before.

Q. And thereupon Judge Moody prepared the order himself?

A. Yes, he brought it into court. I presume he prepared it. He brought it into court in my presence.

Q. There is nowhere in this order, as originally drawn by Judge Moody, any expression or phrase which has been interlined or marked out or anything like that?

A. No. It is all in typewriting except the words "Let decree be entered accordingly." And the date, 22nd, I think was inserted by Judge Thomas; and that is all in Judge Thomas' handwriting—the exception. I asked for an exception.

Q. You immediately took exception to that order?

A. Yes sir.

Q. And you also took exception to the decree which his Honor, Judge Thomas, entered subsequently?

A. Yes sir.

By the COURT: I suppose before making the order to dismiss, or the decree dismissing the complaint, that there was no evidence submitted to the court sustaining the allegations of the complaint or answer?

A. The recital in the judgment is correct. It was based upon the affidavits and pleadings. There was no waiver of verified answer. The answer was verified by defendant. The case had been pending for over three years. There was no extension granted or asked. The time had long passed for taking testimony and no extension asked or granted. When I took the exception I expected to take an appeal; but none, however, was taken, and the judgment and decree has remained in force for whatever it purports to be ever since.

(Bill of Exceptions, P. 107; Printed Abstract, pp. 247-248.)

Also the following portions of the Bill of Exceptions, to-wit:

Plaintiff presented the following rebuttal testimony:

D. A. MCPHERSON testified as follows:

Q. Were you present in the United States Court in 1896 at the time that order dismissing the bill of complaint in the case of yourself against Joseph Swift, a record of which is introduced in evidence here at this trial, at the time it was signed by Judge Thomas?

A. I was every minute.

(Bill of Exceptions, P. 1221 (122 I); Printed Abstract P. 283).

Q. Where was that court held at that time?

A. What is now the present city council chambers; city hall.

Q. Were you also present when the motion was argued?

A. I was.

Q. That was a double motion, a motion of the defendant Joseph Swift to withdraw parte of his answer and another motion for leave to dismiss your bill of complaint?

A. Yes.

Q. You were represented in that matter by Judge G. C. Moody and Mr. E. W. Martin?

A. Yes sir.

Q. You may state what your recollection is as to when the order was signed by Judge Thomas—as to the argument—when with reference to the argument, the same day or the day after or what?

A. My recollection is the papers were signed the following
419 morning. The argument was in the forenoon and the papers were disposed of the next day forenoon.

Q. Did you go to court that noon at the time the order was signed?

A. Yes, with Judge Moody.

Q. Did Judge Moody have the order with him at the time?

A. That is my recollection.

Q. And you and Judge Moody were together in court at the time the order was signed by Judge Thomas?

A. We were.

Q. Did Judge Thomas at the time of signing that order make any statements—(Withdrawn).

Q. You heard the testimony of Mr. Van Cise with reference to certain statements claimed to have been made by Judge Thomas at the time of the signing of that order by him?

A. Yes sir.

Q. You may state to the Court whether or not any such statements were made at that time by Judge Thomas?

A. Not a syllable.

Q. You say you were present during the entire argument of the motion—the two motions in court?

A. I was.

Q. You may state whether anything was said at that time by Judge Thomas at the time that he granted your motion to dismiss the bill?

A. The only remark Judge Thomas made upon it was something like this: Mr. Van Cise was contending for the withdrawal of the affirmative defense number something—13 and 14—and made a motion to accept me as a partner in the proposition provided I would pay one-half of the money. That we declined to do. The other motion based on my affidavit was argued some time and resisted by Mr. Van Cise. The Court in granting our application to dismiss in a jocular way remarked to Mr. Van Cise that by the dismissal of my suit, based upon my affidavit he was attaining the same result as by the granting of his order.

(Bill of Exceptions, P. 122 *j*; Printed Abstract, pp. 283-284-285.)

That is, he would get me as a partner.

Q. That was the remark that Judge Thomas made to Mr. Van Cise?

A. Yes sir—May not have been that exact language, but that was the meaning of his language.

Q. You say that he said that in a jocular manner to Mr. Van Cise after denying Mr. Van Cise's motion and granting yours?

A. Yes. I will say further there was not a word uttered as to the proceeding being final in that case.

(Bill of Exceptions, P. 123; Printed Abstract, P. 285.)

Dated December 20, 1911.

CHAMBERS KELLAR,
N. T. MASON,
JAMES G. STANLEY,
*Attorneys for Defendant in Error.*

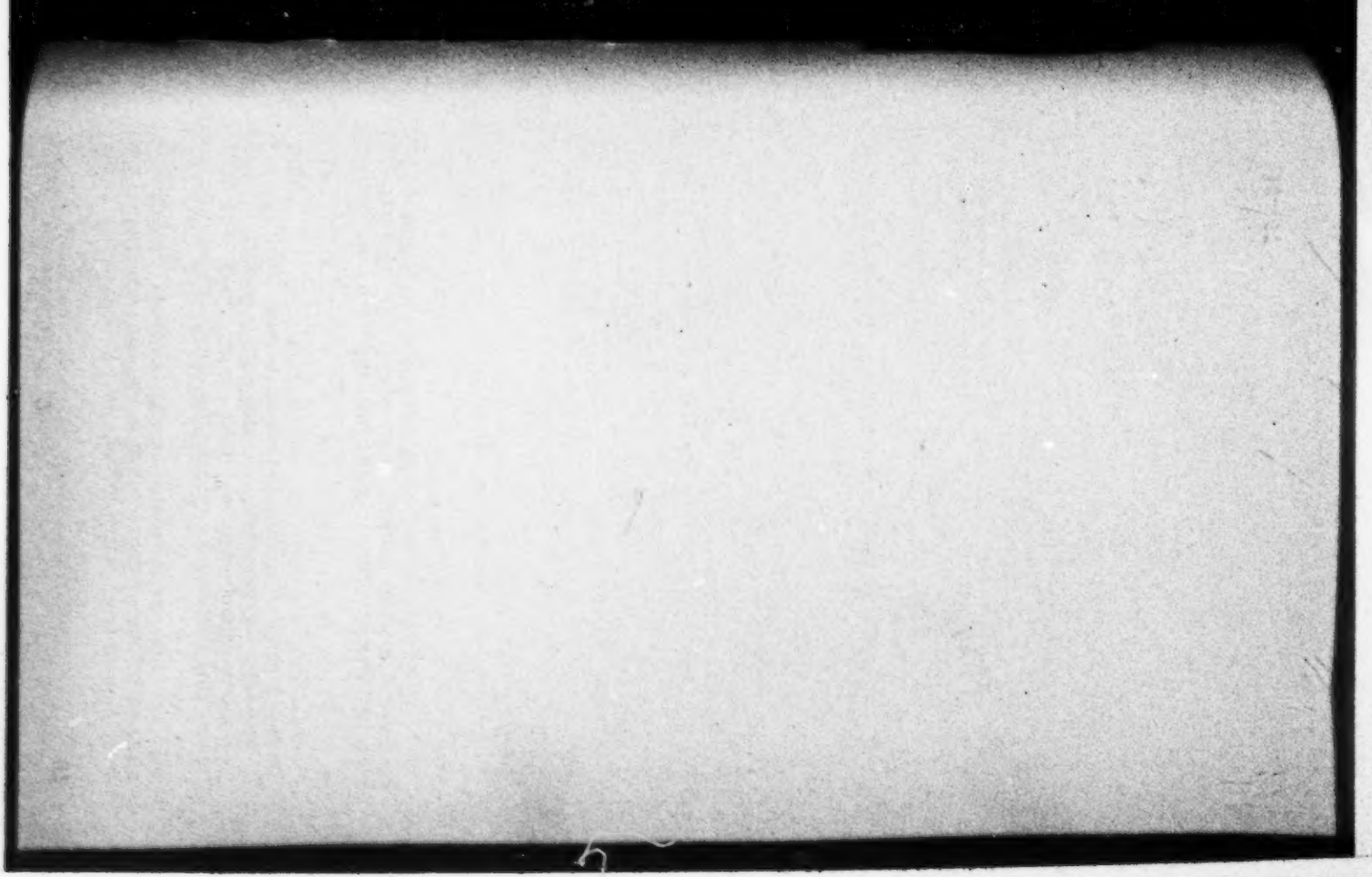
420 [Endorsed:] 751/22827. No. 751. In the Supreme Court of the United States. Joseph Swift, Plaintiff in Error,

vs. Donald A. McPherson, Defendant in Error. Statement & designation of additional parts of the record which Defendant in Error thinks material. Chambers Kellar, Attorney, Lead City, So. Dak.

421 [Endorsed:] File No. 22,827. Supreme Court U. S., October Term, 1911. Term No. 751. Joseph Swift, Pl'ff in Error, vs. Donald A. McPherson. Designation by defendant in error of additional parts of record to be printed. Filed December 26, 1911.

* * * * * * *

Endorsed on cover: File No. 22,827. South Dakota Supreme Court. Term No. 77. Joseph Swift, plaintiff in error, vs. Donald A. McPherson. Filed July 31st, 1911. File No. 22,827.



(22,827)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1913.**

## No. 77.

JOSEPH SWIFT, PLAINTIFF IN ERROR,

*vs.*

DONALD A. McPHERSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 4, 1913.

301 In the Circuit Court of the Eighth Judicial Circuit Within and for Lawrence County, South Dakota.

DONALD A. MCPHERSON, Plaintiff,
vs.
JOSEPH SWIFT and A. W. COE, Defendants.

*Decision.*

This above entitled action came on duly for trial at the court house in Deadwood, Lawrence County, South Dakota, on the 17th day of June, 1909, being a day of the regular February, 1909, term of said court, before the Honorable Joseph W. Jones, judge, sitting without a jury, acting for and in behalf of the Honorable W. G. Rice, judge of the Eighth Judicial Circuit, and at his request and in his absence from the said Judicial Circuit. Said plaintiff appeared in person and by his attorneys, Martin & Mason and Chambers Kellar. Said defendant, Joseph Swift, appeared by his attorneys, Edwin Van Cise, Esq., and C. L. Wood, Esq., and the Court having heard the evidence and testimony adduced in behalf of said respective parties, and the arguments of counsel, and being fully advised in the premises, makes and files this, his decision, consisting of the following separate Findings of Fact and Conclusions of Law.

Findings of Fact.

(1) That on May 14, 1888, the plaintiff's assignor, James K. P. Miller, and the defendant, Joseph Swift, mutually executed and delivered an agreement in writing, a copy of which is contained in paragraph one of the complaint. That said defendant, Joseph Swift, received a valuable consideration for the execution of
302 said contract. That said contract was not procured from the said defendant, Joseph Swift, by means of any misrepresentation whatsoever on the part of said James K. P. Miller, nor by the suppression of any facts whatsoever. That said Miller did not represent to the said defendant Swift that he was a man of large means or property, nor that he was solvent or responsible. That said James K. P. Miller was not acting as the agent or representative of one Christian H. Vehmeyer in the purchase of said property, and that said James K. P. Miller did not have any agreement with the said Vehmeyer as to a division of $3,500 or any other sum, between the said Miller and the said Vehmeyer, and that there was not divided between the said Vehmeyer and the said Miller the sum of $1,500 nor any other sum. That said Miller did not make a commission or profit of $750 on the sale of said property. That the allegations and statements contained in paragraphs fourteen and fifteen of defendant's answer, as to the various alleged misrepresentations, false or fraudulent statements claimed and alleged to have been made by the said Miller to the said Joseph Swift, are untrue, and that said

defendant, Joseph Swift, was not induced to enter into said contract by any false or fraudulent or wrongful statements or representations whatsoever on the part of said James K. P. Miller.

(2) That said James K. P. Miller died on January 12, 1891, having property in Lawrence County, South Dakota. That said James K. P. Miller left a will, by the terms whereof the said Joseph Swift was nominated and appointed one of the executors and trustees of the estate of said James K. P. Miller and that said Joseph Swift was thereafter, to-wit, on February 24, 1891, duly appointed as such executor of said will by the county court of Lawrence County, South Dakota, and thereupon immediately qualified as such executor and continued to act as such until the 27th day of April, 1892, upon which date the said Joseph Swift was removed as such ex-
303 ecutor of the said will of the said James K. P. Miller, deceased. That after the removal of said Joseph Swift as executor of the last will and testament of the said James K. P. Miller, to-wit, on May 23, 1892, one William Selbie was duly appointed as administrator with the will annexed of the estate of said James K. P. Miller, by the said county court of Lawrence County, South Dakota, by an order duly given and made on that date. That said William Selbie, on June 1, 1892, filed with said county court the bond required by its order of appointment, with sufficient sureties, duly approved, and thereupon letters of administration with the will annexed upon the estate of said James K. P. Miller, deceased, where duly issued by said court to the said William Selbie, and that said William Selbie thereupon duly qualified as such administrator and entered upon the discharge of his duties as such, and thereafter continued to act as the duly appointed and qualified administrator with the will annexed of said estate, and that said letters have not been revoked. That said William Selbie, by his appointment as such administrator with the will annexed, as aforesaid, became and was vested and charged with all the interest which the said Miller had in said contract, hereinbefore referred to, and in the property therein described.

(3) That during the period of time from the death of said James K. P. Miller, on January 12, 1891, until the date of the removal of said Joseph Swift as executor of the last will and testament of said James K. P. Miller, on April 27, 1892, the said defendant, Joseph Swift, was in the possession of said contract and the lands and tenements in controversy in this action, so far as the interest of the said James K. P. Miller was concerned, as such executor and trustee.

(4) That at the time of the death of said Miller he was owing debts and liabilities aggregating more than $100,000, none of which had been paid at the time of the appointment of said William
304 Selbie as administrator, as aforesaid, and at the time of such appointment said estate was insolvent and still in debt to an amount of over $100,000, and that it became and was necessary to sell the property belonging to said estate of said Miller, including the property described in the agreement set forth in paragraph one of plaintiff's complaint, hereinbefore referred to, in order to pay the debts of said estate.

(5) That on September 29, 1892, the county court of said Lawrence County, South Dakota, duly made and entered an order for the sale of certain property belonging to the estate of said Miller, including said agreement hereinbefore referred to and the property therein described. That under and by virtue of said order of sale, the said William Selbie, as administrator with the will annexed of said estate of said Miller, did duly sell, assign and transfer unto the plaintiff, Donald A. McPherson, all the right, title and interest of said estate in and to said contract and the premises therein described, and did, on January 11, 1893, by deed duly executed, acknowledged and delivered, under and by virtue of and pursuant to the said proceedings and the order of confirmation hereinafter referred to, transfer and convey unto the said plaintiff, Donald A. McPherson, all the interest of said estate in and to said contract and premises therein described.

(6) That said William Selbie, as administrator aforesaid, after the making of said sale of said contract and premises to the said plaintiff, McPherson, as aforesaid, duly made a return of his proceedings to the said county court, which was duly filed with the judge of said court. That due notice of the hearing of said return was given and that at such hearing the said defendant, Joseph Swift, appeared by his attorney and filed his protest to said sale and his objections to the confirmation thereof, and thereupon the
305 court duly examined said return and witnesses in relation to the same, and after a full examination and hearing the proceedings of said William Selbie, as administrator aforesaid, were approved, and said sale was in all things fully confirmed, and the said William Selbie, as such administrator, was ordered and directed to execute and deliver a deed conveying said property so sold to the said plaintiff, Donald A. McPherson, by an order of confirmation duly made and entered on or about the 31st day of December, 1892.

(7) That the said defendant, Joseph Swift, duly prosecuted an appeal to the Circuit Court of Lawrence County, South Dakota, from the said order of confirmation, and from the order of said county court overruling and denying the objections and protest of said Joseph Swift to the said sale. That said Joseph Swift thereafter, in the spring of 1895, dismissed said appeal.

(8) That said Donald A. McPherson paid to the said William Selbie, as administrator aforesaid, for the purchase of said property, so sold as aforesaid, the full sum of Five Thousand and Five ($5,005.00) Dollars. That said William Selbie was not, either for himself or for the Merchants' National Bank, either directly or indirectly interested in the said sale, and that he was not cooperating in any way whatsoever with the said plaintiff, McPherson, in the purchase of said property.

(9) That during his lifetime the said James K. P. Miller performed all the conditions of said contract required to be performed by him, and that said property was purchased by the said James K. P. Miller with money advanced by the said defendant, Joseph Swift, with which to pay for said property, title thereto being taken in the name of said Joseph Swift, said property to be held and dis-

posed of under the terms and conditions as set forth in said contract.

That said title was taken for the joint interest and benefit of
306 said James K. P. Miller and said defendant, Joseph Swift, and that said Joseph Swift held the title to an undivided one-half (1/2) interest in said property as trustee for the said James K. P. Miller, and now holds the title to such undivided one-half (1/2) interest of such portions of said property as have not already been disposed of, for the benefit of the said plaintiff, Donald A. McPherson.

(20) That a portion of said real property described in said contract was at the time of its purchase in 1888, occupied and improved real estate in the City of Deadwood, South Dakota. That the greater portion of said property has been sold. That from the rentals of such portions of said property as were improved, and from the sales of such portions thereof as have been sold, the defendant, Joseph Swift, has received large sums of money, for which he should account to the plaintiff, Donald A. McPherson, in the manner and to the extent as hereinafter set forth. That the portions of said real property still unsold are described as follows, to-wit:

Lots number one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), and twenty-nine (29), in Block numbered three (3); also

Lots numbered two (2), four (4), six (6), eight (8), ten (10), twelve (12), fourteen (14), sixteen (16), and eighteen (18), in Block numbered four (4); also

Lots numbered one (1), two (2), and three (3), in Block numbered five (5); also

Lots numbered two (2), four (4), six (6), eight (8), ten (10), twelve (12), fourteen (14), sixteen (16), eighteen (18), twenty (20), twenty-two (22), twenty-four (24), and twenty-six (26), in Block numbered six (6); also

Lots numbered one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), thirty-five (35), thirty-seven (37), thirty-nine (39), forty-one (41) and forty-three (43), in Block numbered seven (7); also

Lots numbered one (1), two (2), three (3), and four (4), in block numbered eight (8); also

307 Lots numbered two (2), four (4), six (6), eight (8), ten (10), twelve (12), and fourteen (14), in Block numbered nine (9); also

Lots numbered three (3), fifteen (15), seventeen (17), Nineteen (19), twenty-one (21), twenty-three (23), and twenty-five (25), in Block numbered one (1);

All of said hereinbefore described lots being a part of Hawke Mineral claim No. 45. Also the following described lots, being a part of Hawke Mineral Claim No. 53, to-wit:

Lots numbered six (6), eight (8), ten (10), twelve (12), four-

teen (14), sixteen (16), eighteen (18), twenty (20), twenty-two (22), twenty-four (24), twenty-six (26), twenty-eight (28), thirty (30), thirty-two (32), thirty-four (34), and thirty-six (36), in Block numbered thirty-five (35); also

Lots numbered seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), thirty-five (35), and thirty-seven (37), in Block numbered thirty-six (36); also

Lots numbered thirty-two (32), and thirty-four (34), in Block numbered thirty-seven (37);

All of said hereinbefore described lots being situated in the City of Deadwood, Lawrence County, South Dakota. That said plaintiff, Donald A. McPherson, is the owner, in fee, of an undivided one-half (½) interest of, in and to all of said property hereinbefore in this finding described.

(11) That since the death of said Miller, the said defendant, Joseph Swift, has been collecting all the rents incomes, issues and profits of said property, and has also collected and received the proceeds of all sales of such portions of said property as have been sold. That the total amount of moneys received by the defendant, Joseph Swift, as rents and incomes from said property, since the purchase thereof up to June 1, 1909, not excluding the proceeds of sales, amounts to the sum of Firty-six Thousand Nine Hundred Ninety and 27/100 ($46,990.27) Dollars. That the total amount of moneys received by the defendant, Joseph Swift, during that period, as proceeds of the sales of such portions of said property as have been sold, amounts to the sum of Fifty-six thousand four hundred thirty-six and 76/100 ($56,436.76) Dollars, making a total aggregate of One hundred and Three thousand, four hundred twenty-seven and 03/100 ($103,427.03) Dollars received from rents, incomes, sales and all other sources in connection with the
308 management, ownership or disposal of said property. That after the payment in full of all costs and expenses for taxes, insurance, repairs, improvements, betterments, additional investments for improvements, and all other necessary expenses, and commissions on all collections and commissions on sales, and after repaying to the said defendant, Joseph Swift, the full sum of the original investment of $18,500.00, together with interest thereon, as provided by the terms of said contract, there still remains in the hands of said Joseph Swift on June 1st, 1909, the full sum of Twenty-two Thousand Three Hundred and Seventy-five and 12/100 ($22,375.12) Dollars, one-half of which sum, to-wit, the sum of Eleven Thousand One Hundred and Eighty-seven and 56/100 ($11,187.56) Dollars, belongs to and is the property of the plaintiff, Donald A. McPherson, together with interest thereon at the rate of 7% per annum from June 1st, 1909, for which sum the said plaintiff is entitled to judgment. That in stating the said account and arriving at said net balance of $11,187.56 as the amount due from the defendant, Joseph Swift, to the plaintiff, Donald A. McPherson, the following method of the computation of interest and allowance of credits was adopted by the court, to-wit:

The income from said property should be first devoted to the payment of necessary repairs, expenses, taxes and insurance. Should they be insufficient in any month to satisfy those items, interest should be allowed from the date of payment of such excess until the surplus income is sufficient to satisfy such deficiency with interest. If the income is more than sufficient to pay necessary repairs, expenses, taxes and insurance it should next be applied to the payment of interest on the principal, $18,500.00, at 8% per annum.

309 And if any deficiency thereof remains, interest should be charged plaintiff at 8% from the end of each six months' period on one-half of such deficiency until the net surplus of income shall have paid such deficiency. Net proceeds of sales should be applied to the reduction of the $18,500.00, and any additional investments made by the defendant, Swift. The defendant, Swift, should be allowed the 5% paid as commissions in the management and sale of property and collection of rents. Interest should not be compounded, and except on the invested money, the proper rate is 7%. If the proceeds from rentals and sales of property shall more than repay the defendant, Joseph Swift, in the original investment of $18,500.00 and interest, as aforesaid, and any additional investments made by the defendant, Swift, with interest, as aforesaid, after the payment of all repairs, expenses, taxes and insurance, and interest on any amount advanced by the defendant, Swift, on account of such repairs, expenses, taxes and insurance, the defendant, Joseph Swift, shall be charged interest on one-half (½) of such balance remaining in his hands at the rate of 7% per annum.

310 (12) That prior to the commencement of this action the plaintiff demanded of said defendant, Joseph Swift, that he convey to plaintiff an undivided one-half (½) interest in such portions of said property as had not theretofore been sold and conveyed by said defendant, Joseph Swift, and also demanded that said defendant, Joseph Swift, account to plaintiff for the moneys received by said defendant by reason of the sale of such portions of said premises as had been sold, and for such moneys as had been received by the said defendants as rents, incomes, issues or profits of said premises. That said defendant refused either to account to said plaintiff for any of said moneys, so as aforesaid received by him, and refused to recognize the plaintiff's ownership to an undivided one-half (½) interest in such portions of said property as had not been sold.

(13) That on May 20, 1893, the plaintiff, Donald A. McPherson, began an action against the defendant, Joseph Swift, upon this same contract, and for the same relief as now sought in this action. The former action was begun in this court, the summons and complaint being personally served on Joseph Swift in Lawrence County. Thereafter the defendant, Joseph Swift, duly removed such action to the Circuit Court of the United States for the District of South Dakota, Western Division. Afterwards, by leave of said court, an amended bill of complaint was filed by said Donald A. McPherson

against the defendant, Joseph Swift, on August 11, 1893, which was as follows, to-wit:

"The above named complainant, Donald A. McPherson, by leave of the court first had and obtained, brings this, his amended bill of complaint against Joseph Swift, and thereupon your complainant complains and says:

First. That the complainant is and was at the commencement of this suit a citizen and resident of the state of South Dakota, and the said defendant, Joseph Swift, is and at the commencement of this suit was a citizen and resident of the state of Delaware; that the subject matter of the said suit relates to real property situated in Lawrence County, in the western division of the district of South Dakota.

311 Second. That on or about the 14th day of May, 1888, this plaintiff's assignor, James K. P. Miller, and the defendant, Jos. Swift, executed an agreement in writing of which the following is a correct copy, and mutually signed and delivered the same, to-wit:

This Contract, between Joseph Swift, of Essex County, state of New Jersey, party of the first part, and James K. P. Miller, of Deadwood, Lawrence county, Dakota, party of the second part, witnesseth:

That whereas the said party of the second part has purchased for the said party of the first part, and for joint account, the property situated in the city of Deadwood, Lawrence county, D. T., known as the Hawke Mineral Claim, comprising U. S. mineral claims numbered forty-five and fifty-three, excepting certain portions not deeded to said Swift as shown from his deed from Vehmeyer on record at register of deeds' office, Lawrence county, D. T.

And in consideration of the said party of the second part looking after said property, collecting the rents, attending to all necessary repairs, paying taxes, insurance, etc., the said party of the first part agrees that the said party of the second part shall receive for said services one-half of all net profits from said property, first deducting from said profits eight per cent per annum interest on Eighteen Thousand Five Hundred ($18,500.00) Dollars paid therefor; the said party of the second part to remit to the said party of the first part, monthly, or as fast as collected, the said interest and his half of the profits, and furthermore, in consideration of said party of the second part agreeing to pay to the said party of the first part one-half of any ultimate loss that may occur on said purchase price of Eighteen Thousand Five Hundred Dollars, the said party of the first part agrees that the said party of the second part shall receive one-half of the profits ultimately accruing from the sale of said property above the said purchase price of Eighteen Thousand Five Hundred Dollars.

The said party of the second part agrees that in case there be no income on the investment, owing to the property lying vacant of tenants at any time, to settle with and remit to the said party of the first part, at least once each six (6) months, eight per cent

interest on one-half of the said purchase price of Eighteen Thousand Five Hundred Dollars.

Each party hereto pays in cash when due one-half of all costs upon said property, for taxes, insurance, repairs or other necessary expenses.

All money realized from sales of any part of said property shall be remitted to said party of the first part and credited upon said sum of Eighteen Thousand Five Hundred Dollars purchase money, in liquidation thereof, and stopping the eight per cent interest to the extent of such credits.

Additional investments for improvements subject to same conditions.

New York, May 14, 1888.

JOSEPH SWIFT.
JAMES K. P. MILLER.

GEORGE P. JOHNSON,
D. SCOTT,
*Witnesses.*

312 Third. That thereafter, the said James K. P. Miller, one of the parties who executed the foregoing agreement, died, to-wit, on or about the 12th day of January, 1891, having property within Lawrence county, South Dakota; that subsequent thereto, and on May 23, 1892, William Selbie, of Deadwood, South Dakota, was duly appointed administrator with will annexed of the estate of said James K. P. Miller, by the county court of Lawrence county, South Dakota, which order so appointing him was duly given and made by said county court; that thereafter, on June 1, 1892, said William Selbie filed with the county court the bonds required by its order of appointment with sufficient securities duly approved, and thereupon letter with will annexed were duly issued by the said court to the said William Selbie, and he entered upon the discharge of his duties as such administrator and that the said letters have not been revoked. And the said William Selbie, by his appointment as administrator with will annexed as aforesaid, became and was vested and charged with all the interest which the said Miller had in the contract hereinbefore set forth and in the property therein described.

Fourth. Your complainant further alleges that at the time of the death of the said James K. P. Miller he owed divers and sundry debts and liabilities, amounting in the aggregate to more than $100,000, and at the time of the appointment of the said William Selbie as administrator with will annexed, as aforesaid, the estate of said James K. P. Miller was insolvent and owing debts to an amount exceeding $100,000, a large portion of which still remains unpaid, and it became and was necessary at the times hereinafter stated to sell the real property belonging to the estate of said Miller, including the property described in the foregoing agreement, in order to pay such debts owing by said estate.

Fifth. That thereafter, to-wit, on September 29, 1892, the county court of Lawrence county, South Dakota, made and entered an order for the sale of certain property belonging to the estate of

said James K. P. Miller, including the property described in the agreement hereinbefore set forth, which said order was duly given and made; that under and by virtue of said order of sale, the said William Selbie, as administrator with will annexed of the said estate, did duly sell, assign and transfer unto this plaintiff all the right, title and interest of the said estate in and to said contract hereinbefore set forth and in and to the premises therein described, and did on January 11, 1893, by deed, duly executed, acknowledged and delivered, transfer and convey unto this plaintiff all the interest of said estate in and to said contract and premises therein described and that the plaintiff is the owner thereof; that said sale was duly confirmed by said county court on or about the 20th day of December, 1892; that the consideration paid by the said complainant, Donald A. McPherson, to the said William Selbie, administrator aforesaid, for the sale and purchase of said contract and premises therein described, was the sum of Five Thousand and Five ($5,005.00) Dollars.

Sixth. Your complainant further alleges, upon information and belief, that said James K. P. Miller performed all the conditions of said contract or agreement upon his part; that the said property was in fact purchased by the said James K. P. Miller, the said defendant, Joseph Swift, advancing and furnishing the money with which to pay for the said property.

313 Seventh. That a portion of said property was and is occupied and improved real estate in the city of Deadwood, and a portion thereof has been since the time said agreement was made and is now unoccupied and unimproved real estate in said city.

Eighth. Upon information and belief, that the defendant, since the death of said Miller, has been collecting all rents and income from said property and applying the same to his own use; that upon the purchase of the property described in said agreement the title thereto was taken from the original owners in the name of Joseph Swift, one of the parties thereto, in accordance with the said agreement hereinbefore set forth, for the joint interest and benefit of the said James K. P. Miller and Joseph Swift simply, and that he, the said Joseph Swift, held and still holds an undivided one-half interest therein as trustee for the said James K. P. Miller, and this plaintiff as his successor in interest; that if any taxes or other expenditures have at any time been made by defendant upon such property, which have not been repaid to him, plaintiff is not apprised of such expenditure and does not know the amount, if any, thereof, nor does the plaintiff know the amounts of the rents and income from said property which *has* heretofore been collected and received by the defendant; but your complainant alleges upon information and belief that the said defendant, Joseph Swift, has received as rents and profits from said property much more than he has expended therefor either in taxes or other charges, including the interest upon his advance.

Ninth. Your complainant further alleges, that prior to the commencement of this action, to-wit, on May 20, 1893, this plaintiff duly offered and tendered to the defendant, Jos. Swift, the sum of Nine Thousand Two Hundred and Fifty Dollars and at the same

time exhibiting to and leaving with said defendant, Joseph Swift, a written tender and demand, of which the following is a true copy, to-wit: "To Joseph Swift, Esq.: On behalf of Donald A. McPherson, who has become the beneficiary and purchaser of the contract made between yourself and J. K. P. Miller in his life time, of date the 14th day of May, 1888, relating to the property therein described as the Hawke Mineral Claim, comprising U. S. mineral claim numbered forty-five and fifty-three, excepting certain portions not deeded to said Swift as shown by his deed from Vehmeyer on record at register of deeds' office, Lawrence county, South Dakota, and of the lands therein described.

I hereby tender you the sum of Nine Thousand Two Hundred and Fifty Dollars, in lawful money of the United States, which is the sum apparently due by said McPherson upon the said contract in order to entitle him to the full benefit thereof, and at the same time further on behalf of said McPherson, do request and demand you to execute to him the conveyance for an undivided one-half of said property, which I now hand you.

McPherson became the beneficiary in said contract by virtue of a sale made and confirmed to him by the county court of Lawrence county, through the administrator with the will annexed of said J. K. P. Miller.

Yours truly,

DONALD A. McPHERSON,
By G. C. MOODY,
*His Agent and Attorney.*

314 And at the same time offering and exhibiting to the said defendant a quit-claim deed, conveying the undivided one-half interest so held by him as trustee for plaintiff, the successor in interest to James K. P. Miller, in accordance with said tender and demand, for execution, but that the said defendant refused to accept said tender or to execute said deed, and still refuses to do the same; that upon such refusal by the defendant, the said one-half of the purchase price of said property, to-wit, Nine Thousand Two Hundred and Fifty Dollars was by this plaintiff deposited in the First National Bank of Deadwood, South Dakota, where the same now remains subject to the order of the defendant herein; that this plaintiff now offers to pay the defendant one-half, if any, of all taxes or other expenditures made by the defendant upon said property, which have not already been paid to him from the income thereof, with interest thereon, and this plaintiff will bring the money into court for that purpose at any time during the progress of this litigation.

The plaintiff offers to bring the money into court heretofore tendered the said defendant and deposit it in said bank for the use of said defendant, or so much thereof as may be found due to him upon an accounting had as hereinafter demanded and also to pay to him any other or further sum which may be due said defendant under said contract.

Tenth. Your complainant further states and alleges that there have been good demand and opportunities to sell the said property,

and it could have been sold by the defendant for its full value at almost any time since the decease of the said James K. P. Miller, and it could now be sold for its full value, to-wit, for a price largely in excess of the purchase price of said property, to-wit, Eighteen Thousand Five Hundred Dollars; that defendant has wholly neglected to sell or dispose of the said property or to account for the same or the rents and income thereof, or any portion thereof; but on the contrary has, since the decease of the said James K. P. Miller, repeatedly repudiated the right and claim of said estate and of this plaintiff in and to said property, or the proceeds thereof, or any portion of the same, and still repudiates and denies the interest of the plaintiff and the former interest of the estate therein, and has claimed and is claiming the said property belings to himself, the defendant, in his individual right, to be held or disposed of according to the defendant's pleasure; that since the death of the said James K. P. Miller, the defendant has asserted and still asserts a claim adverse to the rights and interests of said plaintiff's assignor in said property; that on or about the 24th day of February, 1891, letters testamentary were issued by the county court of Lawrence County, South Dakota, to the defendant, Joseph Swift, and others as executors of the estate of James K. P. Miller, deceased, under the last will and testament of said James K. P. Miller, and that the defendant, Joseph Swift, and his co-executors, wholly neglected and refused to inventory the contract and agreement hereinbefore set forth, or the property therein described, or any portion thereof, as an asset or claim of the said estate, but on the contrary asserted that the said estate had no right or interest in said contract, claiming the same as the property of the said Joseph Swift; that on the 22d day of January, 1892, the judge of the county court cited the said Joseph Swift, and his co-executors, to show cause why the said executors should not be compelled to return an additional inventory embracing
315 therein the rights of the said estate, this plaintiff's assignor, in and to the contract and property hereinbefore set forth, and all other property rights in other property under contract of like import. And also to show cause why the said executors should not be removed from their offices as executors of said estate by reason of their failure in this regard, and by reason of their so asserting claim adverse to the interest of said estate; that such proceedings were had therein that, on the 16th day of February, 1892, that the defendant, Joseph Swift, and his co-executors, made their return to the said citation before the said court, the same being verified by this defendant's co-executor, William H. Swift; that the said return was made in writing and referring to the written contract hereinbefore set forth, and to other contracts of like import, asserted and declared as follows: "And as the contract relating to real property, referred to in said citation and order to show cause, and in the affidavits upon which the same were based, they respectfully report that the parties owning and holding the real property described in the said contracts, or in whose name the title of record stands, object to the same being scheduled or inventoried by the executors as a part of the effects or property of the

estate of James K. P. Miller, deceased, and threaten the estate with adverse litigation and proceedings if the same should be attempted to be done, or any steps taken by the undersigned looking to the control or assertion of any claim or control of said property by the executors for or on behalf of the estate of James K. P. Miller, and that the said claimants of said real property assert and maintain that they have a good and sufficient defense in law and equity to any claim on behalf of said estate to any interest whatever on the part of the said estate in and to said real property, or any part of portion thereof; the grounds of which they do not fully state, and as to which those executors are not fully informed." That thereupon the said Joseph Swift and his co-executors were by the said county court removed from their office as executors, and thereafter said William Selbie was by said court appointed as administrator of said estate with will annexed, on May 23, 1892, as hereinbefore set forth, and qualified thereunder June 1, 1892.

Eleventh. Your complainant further alleges that on the 22d day of July, 1892, this plaintiff's assignor, through William Selbie, administrator with will annexed of said estate, caused to be given the said Joseph Swift a notice in writing, which was in words and figures folowing, to-wit, except the description of the property, which is not herein inserted, but which notice included the property de-described in the agreement hereinbefore set forth:

DEADWOOD, SOUTH DAKOTA, *July* 22, 1892.

To Joseph Swift, Wilmington, Delaware:

Please Take Notice: That on the first day of June, 1892, the undersigned, William Selbie, of Deadwood, Lawrence County, South Dakota, was by the county court of Lawrence county duly appointed administrator of the estate of James K. P. Miller, deceased, late of the City of Deadwood, Lawrence county, South Dakota. The undersigned is informed that the said James K. P. Miller at the time of his death was possessed of, and since his decease his estate is possessed of, certain valuable property interest in the following described real property, concerning which certain contracts and agreements were made between yourself and the said James K. P. Miller, to-wit: (Here property was described.)

You will please take further notice that, as administrator and representative of the said estate, the undersigned offers to look after said property, collect the rents, attend to all necessary repairs, the payment of taxes, insurance, etc., as fully and completely as the said James K. P. Miller might do were he alive; and further, that as administrator and representative of the said estate, the undersigned stands ready to fulfill any and all obligations made on behalf of the said James K. P. Miller in relation to said property or his interest therein. If you will notify your agent here to turn over said property to me, I will take charge thereof and look after the said property for the best interests of all concerned, and account for all rents and revenues derived from said property in accordance with the terms of the contract or agreement made with you by Mr. Miller. I suggest further that if you

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desire to purchase the interest of Mr. Miller or of the estate in the said property, or any portion thereof, that, as administrator, I am willing to negotiate for a sale to you of such interest upon a fair valuation under the proper direction of the county court.

Very respectfully,

WILLIAM SELBIE,
*Administrator of the Estate of*
*James K. P. Miller, Deceased.*

Twelfth: That the defendant refuses this plaintiff any part or participation in the said property, or any control over the same; that unless enjoined by this court the defendant will in case of sale of said property by him apply the proceeds thereof to his own use and deny the said estate and this plaintiff any portion or participation therein; that the defendant is a non-resident of the state of South Dakota, and the plaintiff has no remedy against the said defendant unless protected in this proceeding, and that the plaintiff has no plain, speedy or adequate remedy at law for the wrongful acts herein complained of; that the claim of the defendant is wholly without right, and that by reason thereof the interests of this plaintiff in said premises and in and to the proceeds of said property if sold is greatly depreciated and in peril.

Wherefore plaintiff prays:

First: That the defendant, Joseph Swift, be decreed to hold an undivided one-half interest in and to the premises hereinbefore described in trust for this plaintiff, and that said trust be fully declared and set forth by the decree of this court.

Second: That the defendant, Joseph Swift, be enjoined from asserting any claim adverse to the right and interest of this plaintiff's undivided one-half interest in said property.

Third: That the said Joseph Swift be declared to have invalidated said trust and be removed as such trustee, and that a receiver of this court be appointed to take charge of said property, collect the income therefrom, sell and dispose of the same, and divide the proceeds under the direction of the court; or that a partition of said property be made, if it shall appear to the court that the interests of all concerned may be best preserved in that manner.

Fourth: That the defendant be decreed to execute and deliver to this plaintiff a good and sufficient deed of conveyance of an undivided one-half interest in and to the premises hereinbefore described.

Fifth: That defendant be required to account for the rents, profits and income which he has received from said property, to the end that the net receipts thereof properly applicable under said
317 contract may be deducted from the purchase price, provided for in said agreement.

Sixth: For such other and further relief as may be just and equitable and within the power of this court to grant, and for costs of suit.

MOODY & WASHABAUGH,
MARTIN & MASON,
*Attorneys for Plaintiff.*

STATE OF SOUTH DAKOTA,
*County of Lawrence, ss:*

Donald A. McPherson being duly sworn deposes and says: He is the plaintiff in the above entitled action; that he has read the foregoing complaint, knows the contents thereof, and the same is true to his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

DONALD A. McPHERSON.

Subscribed and sworn to before me this 11th day of August, 1893.

ALBERT W. MILLER,
[SEAL.] *Notary Public.*

To the foregoing amended bill of complaint the defendant, Swift, on September 2, 1893, filed a demurrer, as follows:

The above named defendant, Joseph Swift, not confessing all or any of the matters in the amended bill of complaint contained to be true as therein set forth, demurs to said bill for that the same does not state a case nor contain any matter of equity entitling the complainant to any relief against this defendant.

Afterwards this demurrer was brought on for argument and after hearing the same the Court, on May 10, 1894, entered an order overruling and denying the same, with leave to defendant to file an answer on or before the 1st day of July, 1894. The defendant, Joseph Swift, in said action, on July 13, 1894, filed his verified answer, as follows:

*The Answer of the Above Named Defendant to the Amended Bill of Complaint of the Above Named Plaintiff.*

In answer to the said bill I, Joseph Swift, say as follows:

1. I admit that the complainant is a citizen and resident of the State of South Dakota, and that I am a citizen and resident of the State of Delaware, and that the subject matter of this suit relates to real property situated in Lawrence County, and within the jurisdiction of this court.

2. I admit that an instrument in writing of the character referred to in paragraph second in the amended bill of complaint as an agreement, was on or about the 14th day of May, 1888, signed by James K. P. Miller and myself under the circumstances and upon the representations hereinafter set forth, and I believe that the so-
318 called agreement was of and to the purport and effect set forth as a copy therein, but for greater certainty I crave to refer to the original when produced in this honorable court.

3. I admit that James K. P. Miller, one of the parties to the so-called agreement, died on or about the 12th day of January, 1891, having property within Lawrence county, South Dakota. I do not know and cannot set forth as to my belief or otherwise, whether on May 23, 1892, or at any other time, William Selbie was duly or

otherwise appointed administrator with the will annexed of the said James K. P. Miller's estate, by the county court of Lawrence county, or any other tribunal, or whether an order so appointing him was duly or otherwise given or made by said county court; or whether on June 1, 1892, or at any other time, said Selbie filed with the county court a bond as alleged, with sureties duly or otherwise approved, or whether thereupon, or at any other time, letters with the will annexed or otherwise were duly or otherwise issued by said court to said William Selbie; or whether he entered upon the discharge of any duties as such administrator, or whether such letters, if any issued, have not been revoked. And as to all the aforesaid matters and things I deny that I have any knowledge or information sufficient to form a belief. But were such averments true and the said William Selbie appointed and qualified as administrator with the will annexed, as alleged, yet nevertheless, I deny that he became or was vested or charged in any manner with all or any interest which the said James K. P. Miller had (if any) in the so-called contract of May 14, 1888, in the bill of complaint referred to, or any interest whatever in the property therein described. But I allege the fact to be, that if the said James K. P. Miller ever had any interest in law or in fact in the said so-called contract, or in the real property therein described (which I do not admit, but now expressly deny), yet, nevertheless, whatsoever interest he might or may have had passed by his will, duly executed on the 22d day of November, 1890, and duly approved and admitted to probate by the county court in and for Lawrence county, South Dakota, on the 24th day of February, A. D. 1891, whereby and by the terms whereof he devised and bequeathed to his friends and business associates, Joseph Swift, of Wilmington, Delaware, E. B. Beecher, of Westville, Connecticut, and William H. Swift, of Wilmington, Delaware, or to the survivors of them, all his property, real and personal, wherever situated, of which he might die seized and possessed, in trust, for the uses and purposes in said will set forth.

4. I admit that at the time of the death of said James K. P. Miller he owed divers and sundry debts and liabilities, possibly amounting in the aggregate to more than $100,000.00, as alleged in the bill of complaint. And I further admit that on the 23d day of May, 1892, when it is alleged that William Selbie was appointed as administrator with the will annexed of such estate, the estate of James K. P. Miller was insolvent and owing debts to an amount probably exceeding $100,000.00; but as to what portion thereof remains unpaid I am not advised and cannot, therefore, admit or deny. I further deny that I have any knowledge or information sufficient to form a belief as to whether it became or was necessary at the times stated in the bill of complaint, or at any time, to sell the real property belonging to the estate of said Miller, or any part thereof, in order to pay such debts owing by said Miller's estate, and I expressly
319 deny that it became or was necessary, or that said William Selbie had the power or authority as administrator or otherwise to sell the property described in the so-called agreement of May 14, 1888, set forth in the bill of Complaint, or any part thereof.

5. I admit that I have been informed that the county court of Lawrence county attempted, on or about September 29, 1892, to make an order for the sale of real property belonging to the estate of James K. P. Miller, deceased, but I am informed and believe, and upon such information and belief allege the fact to be, that such order was wholly without jurisdiction, and was not duly given or made, and did not include the property described in the so-called agreement in the bill of complaint referred to and alleged to be set forth, or any part thereof. I further admit that the said William Selbie undertook, under such alleged order of sale, to sell the interest of the Miller estate in and to such so-called contract and in and to the premises therein described; but I am informed and believe, and upon such information and belief alleged the fact to be, that such sale was wholly without jurisdiction, was not legally conducted or had, and that said Selbie did not, under or by virtue thereof, duly or legally, in any manner, sell or assign any interest in such alleged contract or the premises therein described, and I expressly deny that the said estate had any interest in such so-called contract or in the premises therein described, as was the object of sale by said William Selbie, or by any other party whomsoever. I admit that, on or about January 11, 1893, the said William Selbie purports to have executed and delivered a deed for the purpose of transferring and conveying to plaintiff the alleged interest of the said estate in said so-called contract and the premises therein described; but I am advised, informed and believe, and upon such information and belief so charge the fact to be, that he was wholly without authority to make, execute or deliver such deed, and that the same carried with it no interest whatever, to the complainant, Donald A. McPherson, and is wholly void and of none effect. I deny that plaintiff and complainant is by virtue thereof, or of any proceedings whatever, the owner of the premises in said so-called agreement described, or of any part of portion thereof. I admit that I have been informed that, on or about the 29th day of December, 1892, the county court made an order attempting to confirm such sale so alleged to have been made by said Selbie, but I deny that the same was duly or legally made. And I am advised, informed and believe, and upon such information and belief so allege the fact to be, that such order was improperly and improvidently made, and that the court was wholly without jurisdiction to make or enter the same. I admit that I have been informed that the complainant, Donald A. McPherson, claims to have paid to said William Selbie, on the alleged purchase and sale, the sum of $5,005.00, but I am informed and verily believe, and upon such information and belief charge the fact to be, that his said claim is unfounded and that he has not paid the sum of $5,005.00, or any other sum whatsoever, but that he is awaiting the result of this litigation and of the appeal taken from the proceedings and attempted proceedings had in the county court before paying such sum of any part whatever thereof. And I further say, and I am advised, informed and believe, and upon such information and belief so charge the fact to be, that not only were the acts of
320 said William Selbie in the premises, as alleged administrator with the will annexed, and of the said county court, wholly

without jurisdiction and void, yet, nevertheless, had they been lawful and authorized, yet, that the said William Selbie was directly interested in the so-called sale of the so-called contract of May 14, 1888, and the premises therein described, and that he was cooperating with the said Donald A. McPherson in the attempted purchase of the so-called interest of said Miller estate in said so-called contract and the premises therein described, to the wrong and injury of the creditors of said estate, and that by reason of his said interest therein and his conduct in the premises, such attempted and alleged sale was wholly void. I am further advised, informed and believe, and upon such information and belief so charge the fact to be, that counsel appeared specially for me in the county court, on the 29th day of December, 1892, and then and there, without admitting the jurisdiction of the court, objected and excepted to its jurisdiction therein, and to the so-called report of sale, and to the court's attempted confirmation of said alleged sale to Donald A. McPherson, and that my counsel then and there offered to prove and did prove, without admitting the authority of the said William Selbie to make such alleged sale or of the county court to confirm the same, that, nevertheless, the said William Selbie was directly interested therein, and upon being overruled by the said county court, duly excepted to its rulings and orders in the premises, and duly entered and took an appeal from such rulings and orders, and particularly and especially from its attempted and alleged order of confirmation of such attempted and alleged sale to the plaintiff and complainant herein, which appeal and appeals are now pending and undetermined in the circuit court of the Eighth judicial circuit of the state of South Dakota in and for Lawrence County, whereby and by reason whereof, even had all the proceedings in the premises been legally and properly had, yet, nevertheless, the plaintiff and complainant herein would be without such title as could not be pleaded or enforced in this court, and I therefore plead this fact in bar of the plaintiff's right further to have and maintain his action and suit herein.

6. I deny that said James K. P. Miller performed all or any of the conditions of said so-called contract or agreement upon his part, except that he collected some money on account of rents, and attended to the payment of some taxes, repairs and insurance therefrom, or from funds of mine otherwise coming into his hands. And I expressly deny that said Miller remitted or paid to me or any — for me at least once each six months, or at any time, eight per cent interest, or any other interest whatever, on one-half of $18,500, except in so far as the small balances on account of rents collected over and above taxes, etc., paid may have constituted a contribution towards such interest, and I will hereafter state and set forth such account of rents collected and taxes, etc., paid. And I further expressly deny that said real property described in said so-called agreement was in fact or otherwise purchased by said James K. P. Miller, but allege the fact to be that said property was purchased by me, for me and with my money, from one Christian H. Vehmeyer,
321 under the circumstances and upon the representations and considerations hereinafter fully set forth.

7. I admit that a portion of the property in said so-called agreement of May 14, 1888, described, was and is occupied and improved real estate in the city of Deadwood; and a portion thereof has been, since the time said so-called agreement was made and is now unoccupied and unimproved real estate in said city.

8. I admit that since the death of said Miller I have been, through my agents upon the ground, collecting all the rents and income from said real property described in said so-called contract or agreement and applying the same to my own use, as I believe I have good right to do. I admit that upon the purchase of said property the title thereto was taken from the original owner, Christian H. Vehmeyer, in my name, but I deny that it was so taken in accordance with the said so-called agreement or for the joint interest and benefit of James K. P. Miller and myself, and allege the fact to be that the deed for said property from Christian H. Vehmeyer to me was made, executed and delivered on or about the 8th day of May, 1888, and before the said so-called agreement was made or entered into. I deny that I have at any time held or now hold an undivided one-half interest in said real property, as trustee or otherwise, for said James K. P. Miller or for the plaintiff in this suit as his successor in interest or otherwise. I deny that I have received as rents and profits from said real property much more or any more than I have expended therefor, either in taxes or for other charges, including interest upon advances made by me, and allege the fact to be that the payments made by me for and on account of said property and the taxes, repairs and other charges thereon and on account thereof, have greatly exceeded the rents and income derived therefrom, as will appear from the following accounts kept by my agents upon the ground, and which I believe to be true, and submit as a part of my answer, subject to modification and correction hereafter if it should be necessary.

| | | |
|---|---|---|
| May 12, 1888—paid Vehmeyer purchase price | | $18,500.00 |
| Paid parties to quit-claim | | 225.00 |
| Total | | $18,725.00 |
| Int. to May 1, 1890, at 8 per cent | $2,890.07 | |
| Rent to May 1, 1890, less taxes & repairs | 2,131.13 | |
| Balance | $758.98 | |
| One-half Miller never paid | | $379.47 |
| One-half charged to investment | | 379.47 |
| Total May 1, 1890 | | $19,104.47 |
| Rec'd for D. G. R. R. right of way | | $2,300.00 |
| | | $16,804.47 |
| Forward | | $16,804.47 |

| | | |
|---|---|---|
| Rents from May 1, 1890 to Mar. 1, 1891, fell short of paying interest and repairs by | | $242.70 |
| Amount Mch. 1, 1891 | | $17,047.17 |
| Interest March 1, '91 to July 1, '94 | $4,545.98 | |
| Paid taxes 1890 | 1,355.65 | |
| Paid taxes 1891 | 1,688.50 | |
| Paid taxes 1892 | 1,245.03 | |
| Paid taxes 1893 | 1,393.37 | |
| Paid special street tax 1893 | 4,064.35 | |
| Paid for bulkhead | 2,093.98 | |
| | | $16,386.86 |
| | | $33,434.03 |
| 322 Collected rents, less repairs Mar. 1, 1891, to July 1, 1894 | | $4,317.93 |
| | | $29,116.10 |

Had the so-called contract been a valid agreement and binding upon me and had Miller lived and continued my agent thereunder, I believe I would have been entitled to add to the foregoing and increase the same by semi-annual computation of interest, and by interest on the taxes from the time of payment thereof, and the item, $379.47, charged to him but never paid. I further report that I have been at some expense in connection with the real property described in said so-called agreement of account of the liens filed against a portion thereof and litigation now pending on their behalf and undetermined, and there may be some other expenses and charges that I have overlooked or forgotten which I shall ask leave hereafter if they occur to me to add.

9. I admit that on or about the 20th day of May, 1893, the plaintiff caused to be delivered to me a copy of the so-called written tender and demand set forth in paragraph nine of his amended bill of complaint and possibly offered or exhibited to me at the same time a quit claim deed of the character indicated in said paragraph, though I did not read the same and did not know the contents thereof, but if any money was tendered or offered to me at the time beyond such offer as may be contained in said paper I did not see it and do not now recall the fact. I admit that I refused to accept the proposed tender mentioned in said instrument and refused to execute such deed and that I still refuse to do so. I do not know, and therefore cannot state as to my belief or otherwise, whether upon my refusal or at any other time the sum of $9,250.00 was by plaintiff deposited in the First National Bank of Deadwood, South Dakota, or whether the same remains there subject to my order.

10. As to whether there has been any good demand and opportunities to sell the said property or whether it could have been sold by me for its full value at almost any time since the death of said

James K. P. Miller, or whether it could now be so sold for its full value, or as alleged in the amended bill, "to-wit, for a price largely in excess of $18,500", I do not know, and the statement is so indefinite that I find it difficult either to admit or deny, but I am informed and believe, and upon my information and belief allege, that at no time since the purchase of said property has there been any active demand for any portion or portions thereof, and that at the present time and for some time past there has been no demand or opportunity to sell said property at any reasonable price whatever. I admit that I have not sold or disposed of said property and that I have not accounted for the same or for the rents or income thereof or any portion thereof, but in so doing I deny that I have neglected any duty or obligation to plaintiff or any one else. I admit that since the death of James K. P. Miller I have denied any right or claim of his estate or of plaintiff in or to said property or the proceeds thereof, or any portion of the same, and that I still deny such claim on the part of plaintiff or of the estate of said Miller to any interest in said property. I admit that I have claimed and still claim that said property belongs to me in my individual right, to be held and disposed of according to my pleasure. I admit that since the death of James K. P. Miller I have asserted and still assert a claim in said property adverse to any right or interest of "plaintiff's assignor" (meaning, as I infer, William Selbie, claiming to act as administrator with the will annexed of the estate of
323 James K. P. Miller, deceased). I admit that on or about February 23, 1891, letters testamentary were issued by the county court of Lawrence county, South Dakota, to myself and others, as executors of the last will and testament of James K. P. Miller, deceased, which will I have already referred to in this answer, but I allege that myself and associates took and accepted said letters not with the view of submitting to the control of said county court their administration of the trust conferred upon them in and by said will, but for the purpose of securing compliance with the statutory requirements regarding the proof of claims against the estate and in some other matters securing the sanction and approval of that tribunal, in view of the fact that myself and co-trustees named in the will were non-residents of the state of South Dakota. I admit that myself and associates did not inventory for the use of the county court (I infer plaintiff means) the so-called contract set forth in plaintiff's amended bill of complaint, or the property therein described, or any portion thereof, as an asset or claim of the said estate, but I deny that this constituted either "neglect" or "refusal" on our part, or that it is in any sense an omission of duty on our part. I admit that I asserted that the estate had no right or interest in said so-called contract, and that I claimed the property therein described as my own property, but as to what my co-executors and trustees may have asserted in that behalf I cannot affirm or deny. I admit that on or about January 22, 1892, the judge of the county court of Lawrence county cited myself and my co-executors not to show cause before such court on the 16th day of February, 1892, as stated in the 10th paragraph of the said plaintiff's bill of complaint,

but ordering and requiring us to make and file a new and complete inventory of the property and effects of the estate of said James K. P. Miller, deceased, including the property set forth in the petition thereto attached and all other properties belonging to the said estate and not inventoried, whether real or personal, which were within the knowledge of said executors, or either of them, and that such inventory should include the interest of said James K. P. Miller, deceased, in the stock and other property of the Deadwood Central Railroad Company, the books of account of the said James K. P. Miller, the contracts mentioned in the petition thereto attached, and all other papers, contracts, accounts and evidence of indebtedness or property rights of the said Miller estate. And in case the said executors should fail to make and file such additional inventory within the time stated, they were further cited to show cause at the same time why they had failed to file the same and why they should not be removed as executors and their letters revoked, etc.; and I admit that the petition attached to said order of said county court purported to set forth a copy of the so-called contract referred to in plaintiff's amended bill of complaint. I further admit that on the 16th day of February, 1892, myself and co-executors made a return to said citation before the said court and that said return was verified by my co-executor and trustee, William H. Swift. I also admit that the said return was in writing, and except for clerical errors contained the language quoted in the 10th paragraph of the amended bill of complaint, though if this court should regard the same as of the slightest materiality in this controversy, I prefer for greater certainty to refer to the original return, and I
324 adduce this language therefrom as a portion thereof immediately following the quotation in plaintiff's bill and which was contained in said return: "And these executors respectfully submit that they (the holders of contracts) should be heard in person or by counsel in this court, before any order be made in the premises. And these executors would further respectfully submit to this court whether, under the terms and conditions of the will of the late James K. P. Miller, deceased, from which they derived their powers as trustees, they can submit to the jurisdiction and control of this court the legal questions arising on the construction of said contracts, and whether this court can pass upon the questions involved therein, or direct or control their conduct in the premises," which in my judgment was a very just and proper statement and return, in view of the fact that by the terms of the will, as before stated, all the estate of the decedent, both real and personal, wherever situated, of which he might die seized and possessed, was given, devised and bequeathed to myself and associates, in trust, for the uses and purposes named in his will, and inasmuch as it was further provided in and by said will that after the probate thereof no court having probate jurisdiction or jurisdiction of the estates of deceased persons should have any control over said trustees, or any direction over the execution of the trust therein reposed, but that the said trustees should execute a trust as provided by the will, according to the best of their judgment. I admit that on the filing of our

return, myself and my co-executors were by said county court removed from office as executors, and I have since been informed that William Selbie claims to have been appointed administrator with the will annexed, but as to whether he was so appointed I do not know, and deny that I have any knowledge of information sufficient to form a belief upon the subject.

But I expressly deny that either myself or associates have been removed from our office as trustees under said will, or that we or either of us have renounced or resigned the trust conferred therein and thereby.

11. I admit that I received from some one a notice of the character set forth and made a part of paragraph 11 of the amended bill of complaint, but as after the death of James K. P. Miller I had employed other persons, who were entirely satisfactory, to look after my properties, collect rents, attend to repairs, pay taxes, insurance, etc., and as I was in no need of further assistance in that regard, I made no reply to the said notice or offer.

12. I admit that I refused the plaintiff any part or participation in the property described in the so-called contract purported to be set forth in the amended bill of complaint, or any control over the same. I admit that in case of sale of said property I shall apply the proceeds thereof to my own use, and deny the said estate and the plaintiff any portion or participation therein, although I see no present opportunities to sell said property or any part thereof, and at the present market rates therefor I have no inclination to sell the same or any part thereof. I admit that I am a non-resident of the state of South Dakota, but I deny that plaintiff has no remedy against me "unless protected in this proceedings," for that I have property in Lawrence County, South Dakota, worth many times the value of the property in controversy, and I am amply able to respond in damages for any claim plaintiff can assert against me in this behalf. I deny that I have either committed or threatened any wrong or been guilty of any acts for which the plaintiff is
325 entitled to relief or remedy, either in law or equity. I deny that I have made any claim or do make any claim that is without right, and deny that by reason of any claim of mine any interest of the plaintiff in the premises described or in the proceeds thereof, if sold, is depreciated or imperiled, or that he has any interest of any kind or character whatsoever in or to said property or any portion thereof.

13. For a further answer and defense to the suit of the plaintiff and complainant, I allege and say, that said so-called contract and agreement of May 14, 1888, was wholly without consideration and procured from me upon and by means of sundry misrepresentations on the part of James K. P. Miller, as hereinafter more fully set forth, and which have only recently come to knowledge, and which as I verily believe, render said so-called contract wholly void. But that if the same should have been based upon sufficient considerations, or should be held now to be valid and binding agreement, yet, nevertheless, it was made and entered into after I had purchased and paid for the property in the instrument described, and had be-

come and was the owner thereof and in possession thereof, and that said so-called contract was merely one of personal employment and subject to be revoked at my pleasure or the pleasure of James K. P. Miller and was revoked by his death; that said so-called contract conferred and was only intended to confer upon said Miller an agency for the purpose named and specified therein, and conferred upon him no interest whatever in the property, and no power to be exercised in relation thereto, or for the sale or disposition thereof, or of any part thereof, and that the said Miller had no interest therein, or any interest that would pass to his heirs or representatives, but that his employment as my agent and representative to the limited extent and for the particular purposes specified in said instrument only, ceased and terminated at his death, on the 12th of January, 1891, and that at all times since that date my agent and agents have been persons wholly and solely accountable to me, and have rendered their accounts to me regarding said property and the care and management thereof, the revenues therefrom, and the expenses incident thereto.

14. For further answer and defense to plaintiff's suit and his amended bill of complaint, I allege and state: Said so-called contract or agreement of May 14, 1888, purporting to be set forth by copy in the second paragraph of said amended bill of complaint, was wholly without consideration, and was obtained from me by the deceased, James K. P. Miller, by means of misrepresentations on his part and the suppression by him of certain material facts, as follows: The said Miller positively asserted and represented to me at divers time about and before May 14, 1888, and before I signed said so-called contract of that date, that he was a man of large means and property, amply solvent and responsible for all obligations he might assume, and I then believed such representations, and that he would be able to meet all the obligations proposed to be imposed on him in said instrument of May 14, 1888; that he made such positive assertions in a manner, as I verily believe, not warranted by the facts and for the express purpose of leading and inducing me to sign such agreement, whereas in truth and in fact, at that time, as I have since learned, he was insolvent and wholly unable to pay liabilities as they matured, and his property was wholly unequal to meeting or discharging his obligations. Whether said Miller believed as he asserted or not, I cannot say but his representations to that
326 effect and my reliance thereon, was one inducing cause leading me into signing said so-called contract, and said Miller in making such statement and representation, asserted that which was not true, and in a manner, as I believe, not warranted by his personal knowledge and information of his financial condition and the values of his property. And further, the said Miller stated and represented to me that I was purchasing said property for the price of $18,500.00, and paying that amount therefor, and that it could not be bought for less, and that he was negotiating the sale as my personal friend and representative upon that basis and for that amount, and wholly without commission or charges to me, whereas, I have been informed since the beginning of this suit (as I had not

before) and verily believe, and upon my information and belief allege the fact to be, that said Miller while pretending to be my agent and representative was acting as the agent and representative of Christian H. Vehmeyer, the seller of the property, upon an understanding and agreement with him that $15,000.00 should be the net selling price for said Vehmeyer and that the difference of $3,500.00 should be used by Miller in quieting certain surface claims and possessory liens upon and against the property, and the balance divided between them, and that after settling said claims and liens for about the sum of $2,000.00, there was divided equally between said Miller and said Vehmeyer the sum of $1,500.00, out of and from the sum of $18,500.00 paid by me for the said property. All of which said Miller suppressed and withheld from me, and thereby said Miller made a commission or profit of $750.00 on the sale of said property to me wholly without my knowledge or consent. And had I known the truth as to said Miller's insolvency, or the truth as to his being the agent of Vehmeyer and getting a part of the money paid by me as a charge or commission, I would not have signed said so-called contract of May 14, 1888, or any contract of such tenor or effect; but relying upon the truth of his representations as aforesaid and desiring to reward him with my employment because of his alleged service without compensation in the negotiations for the purchase of the property aforesaid, and reposing confidence in his integrity and fidelity to me, and by reason thereof only, I was induced to make him trusted agent and employe, as in said instrument of May 14, 1888, set forth. And I now charge that by reason of the foregoing and the untrue statements by said Miller as to his solvency, by his acting as an agent for Vehmeyer, adversely to my interest, and by his suppression of that fact from me, he practiced a fraud and deception upon me, and said so-called agreement of May 14, 1888, induced to be signed by me thereby, was wholly void and of non effect.

Wherefore I pray this honorable court that the plaintiff and complainant may take nothing by this suit and that his bill may be dismissed.

JOSEPH SWIFT, *Defendant.*
EDWIN VAN CISE,
WILLIAM R. STEELE,
*Solicitors for Defendant.*

STATE OF DELAWARE,
*County of Newcastle, District of Delaware, ss:*

Joseph Swift being sworn deposes and says: I am the above named defendant. I have read the foregoing answer, and the same is true of my own knowledge, except as to statements
327 therein made on information and belief, and as to them I believe it to be true.

JOSEPH SWIFT.

Subscribed and sworn to before me this 9th day of July, A. D. 1894.

[SEAL.] JOHN T. PENNYPACKER,
*Notary Public.*

The plaintiff, McPherson, filed his replication in said action on August 6, 1894, as follows:

This repliant, Donald A. McPherson, saving and reserving to himself all and all manner of advantages and exceptions which may be had and taken to the manifold errors and uncertainties and insufficiencies of the answer of the said defendant, for replication thereunto saith, that he doth and will aver, maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

MOODY & WASHABAUGH,
MARTIN & MASON,
*Solicitors for Plaintiff.*

On September 26, 1895, the defendant Swift's solicitors presented to the court and filed the following petition, verified by Edwin Van Cise:

To the Honorable, the Judges of the Circuit Court of the United States for the District of South Dakota:

Your petitioner, Joseph Swift, the defendant in this suit, would respectfully represent to this honorable court:

1. That this suit was begun by the plaintiff, Donald A. McPherson, in the circuit court of the Eighth judicial circuit of the state of South Dakota, by summons dated May 18, 1893, and served about the same date; that thereafter such steps were taken on behalf of this defendant that this suit was removed from the state court into his honorable court; that after its removal plaintiff's solicitors, on or about August 11, 1893, served an amended bill of complaint; that to this amended bill of complaint a demurrer on behalf of this defendant was interposed, which was subsequently argued by counsel for both parties, and overruled by this honorable court in May, 1894; that afterward an answer duly verified by the defendant was served and filed July 13, 1894, and later a replication thereto was served by plaintiff's solicitors, August 6, 1894.

328 2. That since the joining of issue by the replication, as aforesaid, the plaintiff has not taken any evidence or testimony whatever, nor has he obtained any order from this court authorizing this case to be tried upon oral testimony, either in whole

or in part; nor has the plaintiff or his solicitors taken any steps whatever to comply with rule 69 of the rules of practice of this court or the amendments thereto, to the knowledge or information of this defendant, or indicated a purpose or desire to try this case or prepare the same for trial since the service of said replication on August 6, 1894.

3. Your petitioner further says that this suit has now been pending over two years and four months; that this defendant is exceedingly anxious to dispose of it; that he has made frequent overtures and offers to the plaintiff and his solicitors to settle the same by admitting plaintiff to a joint interest or ownership in the property described in the amended bill of complaint upon his accounting equitably to this defendant for the moneys expended in the purchase, protection and improvement thereof. And your petitioner now renews this offer and respectfully asks leave of this honorable court to withdraw from his answer now on the files of this court those portions thereof numbered paragraph- 13 and 14, pleaded as affirmative defense, and to submit to a decree in plaintiff's favor on such terms as may to this honorable court be found equitable and just.

Wherefore this petitioner prays leave of this honorable court to withdraw from his answer said paragraphs 13 and 14 thereof, and that this suit may be referred to the master in chancery of this court or some special master that may be agreed upon between the parties to take testimony and make an accounting between the parties to this suit touching the real property in controversy and the moneys paid out by the defendant on account thereof, and interest thereon, and the rents, revenues, and returns received by defendant therefrom, and report the same to this court, to the end that this court may find and ascertain the amount which it will be equitable and just for the plaintiff to pay the defendant as a condition of relief, and that a decree may then be entered accordingly. And so your petitioner respectfully prays: or for such other and further relief as to this court may seem meet and according to equity.

JOSEPH SWIFT, *Defendant,*
By EDWIN VAN CISE,
WILLIAM R. STEELE,
*Attorneys for Defendant.*

STATE OF SOUTH DAKOTA,
*District of South Dakota, County of Lawrence, ss:*

Edwin Van Cise being duly sworn says: He is one of the solicitors for Joseph Swift, defendant in this suit; he has read the foregoing petition and is familiar with its contents, that the statements made in paragraphs one and two thereof are true to this affiant's knowledge, and as to the remaining allegations in said petition affiant says he believes the same to be true, and states the following as his grounds of belief: That he was some time ago informed personally by the defendant, Joseph Swift, and has later been informed by him by letter, that since this suit was at issue he has made an offer to the plaintiff to accept him as a joint or equal owner in the property

in controversy, upon his accounting to him (said Swift) on
329 equitable terms, the details of which were not given to affiant, but substantially as indicated in paragraph 8 of the answer and the contract there stated; that this affiant has also by authority of said Swift, within the past year, made the same offer to Hon. G. C. Moody, one of plaintiff's solicitors; that this affiant is now authorized by the defendant to renew the offer and to make the offer contained in the foregoing petition, and now presents this petition and the offer contained therein by virtue of such authority from said defendant. That the reason that this application was not made sooner to this honorable court is that the defendant and his solicitors hoped and believed that this suit could be settled or some disposition made thereof without further aid of the court, but that in this they have been disappointed, and now, therefore, invoke the aid of this court, as stated in the foregoing petition.

EDWIN VAN CISE.

Subscribed and sworn to before me this 26th day of September, 1895.

[SEAL.] JOHN R. RUSSELL,
*Notary Public.*

Upon presentation of the foregoing verified petition the following order to show cause was issued by the judge of said court, to-wit:

On the annexed verified petition of the defendant and all the pleadings and papers on file in this case, let the plaintiff or his solicitors show cause before the judge of this court on Friday, September 27, 1895, at 2 o'clock p. m., at his chambers in the court house in Deadwood, South Dakota, why defendant should not be allowed to withdraw from his answer paragraphs 13 and 14 thereof, and this cause be referred to the master in chancery of this court or some special master to be agreed upon between the parties, to take testimony and make an accounting between the parties to this suit, touching the real property in controversy and the moneys paid out by defendant on account thereof and interest thereon, and the rents, revenues, and returns received by defendant therefrom, and report the same to this court; or such other order be made in the premises as may be meet and according to equity.

Deadwood, S. D., September 26, 1895.

A. J. EDGERTON, *Judge.*

The postponed hearing of said order to show cause was had at the next term of said United States court, to-wit, on February 22, 1896. The plaintiff, McPherson, in said action, filed the following affidavit and return to said order to show cause, to-wit:

STATE OF SOUTH DAKOTA,
*County of Lawrence, ss:*

Donald A. McPherson, the complainant in the above entitled cause, being duly sworn, says in answer to the petition of
330 the defendant attached to the order to show cause herein, that he has moved this honorable court to dismiss the bill

of complaint herein and desires to have such bill of complaint dismissed, for the following among other reasons: The offer and tender of the purchase price for the property involved in this controversy was long since withdrawn by affiant, and was so withdrawn before the procurement of said order to show cause. When the tender was made to the defendant by affiant's direction the property in controversy was of very considerable value, so much so that if affiant's demand had been complied with by the defendant, as it ought to have been at the time of such tender and affiant given an interest in said property, it could have been sold for a sum which would have realized the price which affiant was willing to pay therefor and a considerable profit in addition, but the defendant refused to accept the tender and refused to give affiant any interest whatever in said property, and refused to carry out such contract and denied that plaintiff was entitled to any interest whatever in said contract.

Affiant further says that afterward and before the order to show cause was procured in this case, the property in controversy was very much depreciated in value and would not have sold and will not now sell and is not worth in the market near the amount which affiant was willing to pay therefor. Therefore, defendant having declined to receive the tender or to give affiant any interest in said property whatever, denying to him any right to dispose of the same and refusing himself to dispose of it, or any portion of it, this affiant did not deem it incumbent upon him to leave so large an amount of money idle nor did he feel himself bound in any wise to make another tender, or to pay the price which he was willing to pay therefor while said property was of value.

Affiant further says that the only offer which the defendant has ever made to this affiant to accept this affiant as a co-owner in said property, or to carry out the contract set out in the bill of complaint in this cause, has been accompanied by so gross and unreasonable and account for expenditures in caring for the property as to indicate to affiant that if he becomes a co-owner with the defendant in the title to the property he would be constantly harassed by unjust and outrageous claims made as pretended expenditures for the care of said property and the collection of the income therefrom.

Affiant further says that the account which was handed to affiant by the agents of said defendant contained charges amounting to $6,182.07 for the collection of rents upon said property amounting to $5,841.86 and containing other like charges for pretended expenditures, which satisfied this affiant that under no circumstances which could be seen and understood by affiant would it be possible to escape constant annoyance, litigation and loss by becoming a part owner of said property with the defendant.

Affiant further says that defendant himself, subsequent to his account being handed to affiant, admitted to affiant and stated that there were one or two thousand dollars or charges in the account which undoubtedly were incorrect and wrong.

Affiant further says that at no time has the defendant tendered or offered to execute and deliver to this affiant any conveyance to the

one-half interest in said property, or for any portion thereof,
331 or to give him any reasonable information, or to exhibit to him any vouchers for any expenditures which he has made with reference to said property.

Affiant further says that the contract set out in the bill of complaint does not require this affiant to pay any part of the purchase money for said property, but the same is to be paid at affiant's option out of the proceeds of the sales thereof. Affiant was willing at the time, nevertheless, to pay all that the said Miller could possibly be under obligations to pay at any time, and take the title to himself of his share of the property, to the end that it might be disposed of while the ruling and market rates of said property were of the character which affiant has indicated, and which would have paid both of the parties a fair profit, but since defendant's refusal to convey for an unreasonable time and the depreciation of the value of the property, affiant is not willing now to exceed the strict letter of the contract with reference to the mode and manner of reimbursing the said defendant for the original purchase price thereof.

Wherefore the complain-t prays this court to discharge the order to show cause and dismiss the bill of complaint herein, as prayed for in his motion.

DONALD A. McPHERSON.

Subscribed and sworn to before me this 19th day of February, A. D. 1896.

[SEAL.] J. S. DENMAN,
*Notary Public.*

On the same day, February 22, 1896, the solicitors for the plaintiff McPherson filed in said court their motion as follows:

Now comes the complainant, by E. W. Martin and G. C. Moody, his solicitors, and moves this honorable court to dismiss the bill of complaint heretofore filed herein in the above entitled cause.

Dated, Deadwood, S. D., February 18, 1896.

E. W. MARTIN,
G. C. MOODY,
*Solicitors for Donald A. McPherson, Complainant.*

On the same day, February 22, 1896, the court made the following order, to-wit:

Upon reading and filing the foregoing motion of the complainant to dismiss his bill of complaint herein, it is by the court considered and ordered that said motion be and it is hereby granted and the complainant's bill of complaint is dismissed at complainant's cost. Let decree be entered accordingly.

Done in open court this 22d day of February, A. D. 1896.

By the Court:

ALFRED D. THOMAS, *Judge.*

332 To which the defendant Swift duly excepted and his exception was allowed, as follows:

Defendant duly excepted to this order on this 22d day of February, 1896.

ALFRED D. THOMAS, *Judge.*

On the same day, February 22, 1896, the court signed and entered the following decree:

This cause coming on to be heard upon the application of the defendant, Joseph Swift, for leave to withdraw from his answer now on the files of this court, paragraphs 13 and 14 thereof, and submit to a decree in plaintiff's favor on such terms as may be found equitable and just, and upon the order granted September 26, 1895, by the judge of this court, requiring the plaintiff or his solicitors to show cause why defendant should not be allowed to withdraw from his answer said paragraphs 13 and 14 thereof, and this cause *he* referred to the master in chancery of this court or some special master to be agreed upon between the parties, to take testimony and make an accounting between the parties to this suit touching the real property in controversy and the moneys paid out by defendant on account thereof and interest thereon, and the rents, revenues and returns received by defendant therefrom, and report the same to this court, or such other order *he* made in the premises as might be meet and according to equity; and the same being now heard before this court upon the petition of Joseph Swift, verified by his solicitor, Edwin Van Cise, upon which said order to show cause was based, and upon the resisting affidavit of the plaintiff, Doland A. McPherson, this day submitted and filed; and at the same time the complainant, by his solicitors, filing his motion in this court to dismiss his bill of complaint heretofore filed herein in this case, the complainant, Donald A. McPherson, appearing by his solicitors G. C. Moody and E. W. Martin, and the defendant by his solicitor, Edwin Van Cise, and the court having heard the matters in controversy upon the affidavits aforesaid and the bill of complaint, verified answer and replication, on file herein, and being fully advised in the premises,

It is now ordered that the application of the defendant be and the same is hereby denied, and the order to show cause granted September 26, 1895, be and the same is hereby vacated and discharged.

It is further ordered, considered, adjudged and decreed that this suit and the bill of complaint heretofore filed herein on behalf of the complainant and against the defendant, *he* and the same is hereby dismissed.

It is further ordered and adjudged that defendant have and recover of and from the complainant, Donald A. McPherson, the costs of this suit, taxed at $30.30.

Done this 22d day of February, A. D. 1896.

By the Court,

ALFRED D. THOMAS, *Judge.*

To which order and decree counsel for the defendant, Joseph Swift, excepted, and the exception was allowed, as follows:

333 To which order and decree counsel for defendant duly excepted, February 22, 1896.

ALFRED D. THOMAS, *Judge.*

(14) That no evidence, testimony or proofs was ever taken or submitted in said action upon the hearing of said motion of the defendant, Joseph Swift, for leave to withdraw from the answer of said Joseph Swift paragraphs 13 and 14 thereof and submit to a decree in plaintiff's favor, nor upon the hearing of said motion of the said complainant, Donald A. McPherson, for leave to dismiss his bill of complaint in said action, and that there was no hearing or trial in said action in said United States court upon the merits, and that the said bill of complaint of said complainant, Donald A. McPherson, therein, was not dismissed upon the merits nor for want of equity.

(15) That the said plaintiff, Donald A. McPherson, in said previous action did not openly or otherwise abandon or renounce his claim or cause of action, but on the contrary stood upon his strict rights under the contract, as he understood them, and a dismissal of said bill of complaint in said previous action, by the said plaintiff, Donald A. McPherson, in the manner as hereinbefore set forth, was not and is not a bar to this present suit.

(16) That the plaintiff, McPherson, did not after the dismissal on his part of said former suit, openly or publicly or in any manner whatsoever disavow or disclaim any interest in said property involved in this action. That the defendant, Swift, did not make any expenditures by way of improvements or otherwise upon said property because of any statement or conduct whatsoever on the part of the plaintiff, nor was there any enhanced or increased value of the property in controversy by reason of any efforts, labors or expenditures by the defendant. That the plaintiff has not in

334 any manner abandoned his interest in said property, nor has he been guilty in any manner of any laches or negligence in the assertion of his claim thereto, and that the plaintiff's claim has not grown stale nor inequitable.

(17) That the defendant, Joseph Swift, has not been in the open or notorious or exclusive or uninterrupted possession of the real property in controversy since May 8, 1888. That from the date of the purchase of said property in May, 1888, until the death of said James K. P. Miller, on January, 12, 1891, the said Joseph Swift openly and notoriously acknowledged the right, title, interest and claim of the said James K. P. Miller in and to said property, and said Miller was in possession of said property and during said period of time was collecting the rents, and incomes therefrom and remitting the same to the said defendant, Joseph Swift, less such amounts as were properly expended by the said Miller in payment of taxes, insurance, repairs and other proper expenses. That after the death of said Miller, on January 12, 1891, the said defendant, Joseph Swift, was in the possession of said property as a partner, executor and trustee of said Miller, until the date of the appointment of William Selbie as administrator with the will annexed of the estate of James K. P. Miller, on May 23, 1892. That this action was

commenced June 18, 1901. That said defendant, Joseph Swift, has not paid the taxes assessed upon or against the said property in controversy in this action except that the said defendant did upon several occasions advance the necessary taxes temporarily, but the same were repaid to the said defendant, Joseph Swift, in full, with interest thereon in each instance, within two or three years after such payment.

(18) I find that the allegations of plaintiff's complaint are true and that the allegations of defendant's answer, except as otherwise specifically found and stated in the foregoing findings, are untrue.

335 As conclusions of law from the foregoing findings and the admissions contained in the pleadings, the court decides:

(1) That plaintiff is entitled to judgment against the defendant, Joseph Swift, for the sum of $11,187.56 with interest thereon at 7% per annum from June 1st, 1909, together with the costs and disbursements of this action.

(2) That plaintiff shou-d be adjudged to be the absolute owner, in fee, of an undivided one-half (½) interest in and to the unsold portions of the real property described in plaintiff's complaint, such unsold portions being described in Finding No. 10 of this decision, together with all rents and incomes derived from said undivided one-half interest from June 1st, 1909.

(3) That the defendant, Joseph Swift, and all persons claiming or to claim under or through him should be perpetually enjoined and restrained from asserting any right, title, interest, claim or demand of, in or to said undivided one-half interest in and to said property, and from in any wise interfering with the same or with the rents and incomes thereof.

Let judgment be entered accordingly.

Dated January 10th, 1910.

By the Court:

JOSEPH W. JONES, *Judge.*

Attest:

SOL STAR, *Clerk.* [SEAL.]

To the making of the foregoing findings and conclusions and to each of them the defendant, Joseph Swift, by his counsel, then and there excepted which exception is duly allowed.

JOSEPH W. JONES, *Judge.*

336–402 (Endorsed:) Original. In Circuit Court, Eighth Judicial Circuit, Lawrence Co., S. D. Donald A. McPherson, Plaintiff, vs. Joseph Swift et al., Defendants. Decision. Personal service of the within Decision admitted this 3rd day of August, 1909, Edwin Van Cise, Attorney for Defendants. Filed this 13th day of June, A. D. 1910. Sol Star, clerk of Circuit Court Lawrence County, S. Dak.

* * * * * * *

402*a* In the Supreme Court of the State of South Dakota.

DONALD A. MCPHERSON, Plaintiff and Respondent,
vs.
JOSEPH SWIFT and A. W. COE, Defendants and Appellants.

*Order Allowing Writ of Error.*

Now at this time coming on to be heard the petition of the above named Joseph Swift defendant and appellant in this Court for a writ of error, filed for and on his behalf by his attorneys, Edwin Van Cise, Frank L. Grant and Philip S. Van Cise, together with an assignment of errors; and after consideration,

It is ordered that a writ of error be and is hereby allowed to have reviewed in the Supreme Court of the United States the judgment heretofore entered in this Court, and the amount of bond on said writ of error be and hereby is fixed at twenty-five hundred dollars ($2,500.00) to operate as a supersedeas, upon the filing of which bond in proper form with the Clerk of this Court, with surety to be approved by the undersigned, a citation will issue as provided by law, and all further proceedings will be suspended in this Court upon said judgment until the determination of said writ of error by said Supreme Court.

Dated May 22nd, 1911.

[Seal Supreme Court, State of South Dakota.]

ELLISON G. SMITH,
*Presiding Judge of the Supreme Court of the State of South Dakota.*

Attest:
FRANK CRANE,
*Clerk of said Court.*

402*b* [Endorsed:] 2949. In the Supreme Court of the State of South Dakota. Donald A. McPherson, Plaintiff and Respondent, vs. Joseph Swift et al., Defendants and Appellant-. Order allowing writ of error. Supreme Court, State of South Dakota. Filed May 2, 1911. Frank Crane, Clerk.

403 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of South Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of South Dakota before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Donald A. McPherson, plaintiff and Joseph Swift and A. W. Coe, Defendants, wherein was drawn in

question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity;
or wherein was drawn in question the construction of a clause
404 of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Joseph Swift, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 25th day of May, in the year of our Lord one thousand nine hundred and eleven.

[Seal Circuit Court of the United States, District of South Dakota.]

OLIVER S. PENDAR,
*Clerk of the Circuit Court of the United States within and for the District of South Dakota,*
By ODIN R. DAVIS, *Deputy.*

Allowed by
ELLISON G. SMITH,
*Presiding Judge of the Supreme Court of the State of South Dakota.*

405 *Return to the Writ of Error.*

UNITED STATES OF AMERICA,
*State of South Dakota, ss:*

In obedience to the command of the within writ I herewith transmit to the Honorable The Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled cause and with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of the Supreme Court of the State of South Dakota, at the City

of Pierre, in the County of Hughes, being the capital of said State, this 17th day of July, 1911.

[Seal Supreme Court, State of South Dakota.]

[SEAL.] FRANK CRANE,
*Clerk of the Supreme Court of the State of South Dakota.*
By LESLIE PARRY, *Deputy.*

406 Know all men by these presents, That we, Joseph Swift, as principal, and American Surety Company of New York, as sureties, are held and firmly bound unto Donald A. McPherson in the full and just sum of twenty-five hundred dollars, to be paid to the said Donald A. McPherson, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of May, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a term of the Supreme Court of the State of South Dakota in a suit depending in said Court, between Donald A. McPherson, plaintiff and respondent, and Joseph Swift and A. W. Coe, defendants and appellants, a judgment was rendered against the said Joseph Swift and the said Joseph Swift having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Donald A. McPherson as aforesaid citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Joseph Swift shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOSEPH SWIFT. [SEAL.]
AMERICAN SURETY COMPANY
OF NEW YORK,
By SYLVESTER D. TOWNSEND, [SEAL.]
*Res. Vice President.*

Attest ROBT. HUNT, [SEAL.]
*Res. Asst. Sec.*

Sealed and delivered in presence of—
C. V. WRIGHT.
E. DRISCOLL.

Approved by:
ELLISON G. SMITH,
*Presiding Judge of the Supreme Court of the State of South Dakota.*

407 *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

The first quarterly meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Wednesday, January 19, 1910, at 12 o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York:

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 14, 1909, for the purpose of nominating officers, of the Company, * * * for the ensuing year, beg leave to report as follows:

"We nominate for

* * * * * * *

| Place. | Resident vice-presidents. | Resident assistant secretaries. |
|---|---|---|
| Wilmington, Del. | James P. Winchester | Robert Hunt |
| | James H. Wilson | Robert Penington |
| | Otho Nowland | |
| | J. Chester Gibson | |
| | Robert Penington | |
| | Sylvester D. Townsend | |
| | F. L. Gilpin | |
| | Robert Hunt | |

* * * * * * *

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present for the officers, members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, and Counsel, as recommended by the Nominating Committee for the ensuing year; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year.

* * * * * * *

"The following resolution was adopted:

"Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
*County of New York, ss:*

I, H. A. Reiss, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 26th day of January, 1910.

[SEAL.] H. A. REISS, *Assistant Secretary.*

408 UNITED STATES OF AMERICA, *ss:*

To Donald A. McPherson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of South Dakota wherein Joseph Swift is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Ellison G. Smith, Presiding Judge of the Supreme Court of the State of South Dakota, this 26th day of May, in the year of our Lord one thousand nine hundred and eleven.

[SEAL.] ELLISON G. SMITH,
*Presiding Judge of the Supreme Court of the State of South Dakota.*

Attest:
FRANK CRANE, *Clerk.*

STATE OF SOUTH DAKOTA,
*County of Lawrence, ss:*

I, Frank Noonan, Sheriff of Lawrence County, South Dakota, do hereby certify and return that the annexed citation came into my hands on the 31st day of May, A. D. 1911, and that I served the same on Donald A. McPherson, the within named defendant personally by delivering to and leaving a true copy thereof with him at Deadwood, in Lawrence County, in South Dakota, on the 1st day of June, A. D. 1911.

FRANK NOONAN,
*Sheriff of Lawrence County,*
By G. L. HARPER, *Deputy.*

| | |
|---|---|
| Summons | $.... |
| Complaint | .... |
| Affidavit | 1.00 |
| Notice | .... |
| Order | .... |
| Citation | .60 |
| 1 Copies | .25 |
| Mileage 1 | .10 |
| Fees | $1.95 |

STATE OF SOUTH DAKOTA,
*County of Lawrence, ss:*

On this 1st day of June, in the year of our Lord one thousand nine hundred and eleven, personally appeared Frank Noonan, sheriff, before me, the subscriber, John R. Jones, a Notary Public within and for the County and State above named, said Frank Noonan being well known to be the sheriff of said county and makes oath that he delivered a true copy of the within citation to the within named Donald A. McPherson at Deadwood, in Lawrence County. State of South Dakota, on the 1st day of June, A. D. 1911.

FRANK NOONAN.

Sworn to and subscribed the 1st day of June, A. D. 1911.

[SEAL.] JOHN R. JONES,
*Notary Public.*

[Endorsed:] Original. 2949. Supreme Court, State of South Dakota. Filed May 27, 1911. Frank Crane, clerk.

409–421 In the Supreme Court of the State of South Dakota.

DONALD A. MCPHERSON, Plaintiff,
vs.
JOSEPH SWIFT, Defendant.

*Certificate of the Clerk of the Supreme Court of the State of South Dakota.*

I, Frank Crane, Clerk of the Supreme Court of the State of South Dakota, do hereby certify that the above and foregoing is a full, true, complete and correct transcript of the record in the above entitled cause, as the same now remains on file in my office; that as required by law and the writ of error from the Supreme Court of the United States herein filed, I herewith transmit the same to the Supreme Court of the United States, together with the original petition for writ of error, the original assignments of error, the original order allowing the writ of error, the original writ of error, with my return thereto, and the original citation with the proof of service thereon, and abstract upon which the cause was heard in the state Supreme Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court of the State of South Dakota, at the capital thereof, to wit, the City of Pierre, in the County of Hughes, in said State, this 17th day of July, A. D. 1911.

[SEAL.] FRANK CRANE,
*Clerk of the Supreme Court of the State of South Dakota.*
By LESLIE PARRY, *Deputy.*

422 Supreme Court of the United States, October Term, 1913.

No. 77.

JOSEPH SWIFT, Plaintiff in Error,
vs.
DONALD A. MCPHERSON, Defendant in Error.

*Additional Parts of Record Designated for Printing by Plaintiff in Error.*

Now comes the plaintiff in error, and respectfully states, that in the statement of parts of the record thought by plaintiff in error to be necessary for the consideration of errors assigned, which was served upon attorneys for defendant in error, it was intended by the designation, "Decision of the trial court (findings of fact and conclusions of law) with the exceptions noted thereto and allowed by the Judge," to mean the decision as filed and made a part of the record in South Dakota, found here in the transcript at pages 301-36, and not to the same as incorporated in the bill of exceptions (and as to finding No. 13 in skeleton). That by some oversight or misunderstanding of our request or designation, the matter in the bill of exceptions as found at pages 214 to 228 inclusive was printed, with an addition to include Judge's signature and certificate from the record on page 336 of the transcript. To avoid any confusion, we therefore request that this Decision as found at pp. 301-36 of the transcript be printed, as necessary for the consideration of errors assigned.

423 Also please print, as possibly necessary in practice to be before the Court, the following parts of the transcript of the record:

Order granting writ of error, p. 402a.
Writ of Error, p. 403.
Return to same by clerk, p. 405.
Bond on obtaining writ, p. 406.
Citation and return of service, p. 408.
Certificate to record by clerk Crane, p. 409.

Also please print to supply an omission in the request of attorneys for defendant in error, McPherson, a portion of the testimony of witness Van Cise, given in behalf of the plaintiff in error upon the trial of the cause, and contained in the transcript of the record certified here from the Supreme Court of South Dakota, to be found in

the bill of exceptions as a part of such record beginning at page 103 thereof, and in the printed abstract, referred to by attorneys for McPherson and on file here as indicated by the Clerk's index (p. IV, a) at page 242 thereof,—said portion to be inserted in lieu of the line of stars on page 92 of the printed transcript of record, to follow the words there, "Judge Thomas inserted the date and signed his name," as a continuation of the testimony of said witness, as follows:

The witness continued: Judge Thomas said: "O yes, it is to be a final matter. You write those words," and added: "You, Mr. Van Cise, will prepare the decree."

Q. That is the proceeding which was had on the return of the order to show cause which the defendant procured, including a request for leave to strike out allegations 13 and 14?

A. Yes sir.

Q. And asking that the Court allow or decree the plaintiff to come in as full partner as he demanded?

A. Yes sir.

Q. Who drew the decree in accordance with Judge Thomas' order?

A. I prepared the decree in my own office, and took it in is my recollection now, the afternoon of the same day. It is dated
424 the same day, and it is my recollection the order prepared by Judge Moody was presented on the morning of that day, the 22nd day of February, and I went back to my office and prepared the decree and presented it in the afternoon of February 22, 1896.

Q. The decree you prepared and submitted on that day and which was executed (entered?) on that day is the one introduced in evidence here showing a dismissal of that Federal Court action?

A. Yes sir.

Q. Who represented the plaintiff at the time of that litigation?

A. Judge Moody at the time. I do not recollect that any one else was there. Both at the time of the entry of the order, and I think also at the time the decree was presented for the Judge's signature he declined Judge Moody's application to insert the words, "Without prejudice," and also declined my application to insert the words, "On the merits." He said to Judge Moody: "We want to make an end of this litigation." To me he said, in Judge Moody's hearing "It is not necessary to enter the words, 'On the merits,' in a judgment in a Federal Court. Look at your Federal decisions; they are uniform. The words, 'On the merits' are not necessary to its finality." I prepared the decree under that instruction from the court, A. D. Thomas, Judge.

Also please print, to supply an omission in the request of said attorneys for McPherson, the cross-examination of said McPherson as a witness as found in said bill of exceptions beginning at page 124 and in said printed abstract at pages 286 to 290, to follow the last answer of said witness near the foot of page 96, of the printed transcript of the record as follows, to-wit:

On cross-examination by Mr. Van Cise, this witness testified as follows:

Q. You agree with me in my recollection that the argument on those motions was probably on the day previous to the date of the signing of the order?

A. I think so.

Q. And if the date of that order and decree is the 22nd *that* the argument had was probably on the 21st?

A. I do not remember the date. I think it was the pre-
425 vious date.

Q. Were you there at that time?

A. Yes sir.

Q. Do you remember as to the affidavit you made whether that was taken over and filed about the same time?

A. Yes.

Q. This is the affidavit signed by you?

A. Yes.

Q. In which you ask leave to dismiss the action?

A. Yes, that is my signature.

Q. That is probably verified the day it bears date?

A. I think so.

Q. It was taken over and filed about the time of that order?

A. I think so.

Q. And you went there with Judge Moody when he went to make that argument?

A. Yes, I either went there with him, or was there.

Q. You were there in court *with* the affidavit was read by him to the court?

A. Yes sir, every minute.

Q. And you heard my argument and his?

A. Yes, I heard both of them.

Q. And you think you were there on the following day when Judge Moody took the order over?

A. Yes sir.

Q. Mr. Martin was not there?

A. I have no distinct recollection about Mr. Martin.

Q. Judge Moody had taken the active part in that matter at that time?

A. Yes sir.

Q. I call your attention to the motion to dismiss the case which was continued, and ask you if Judge Moody did not sign both of those names, E. W. Martin and G. C. Moody?

A. That is his writing on both.

Q. I call your attention to the order made. Are not the words, "Let decree be entered accordingly," in Judge Moody's handwriting?

A. Yes sir.

Q. Were you there when that was written by him—Do you recollect anything about it?

A. I cannot recall that incident especially.

Q. You would not be disposed to dispute the correctness of my

statement that he entered those words by the order of Judge Thomas—that Judge Thomas told him to write those words in?

A. I doubt it.

Q. Would you dispute my statement that Judge Thomas directed him?

A. No.

Q. You say as a matter of fact that is Judge Moody's handwriting?

A. Yes.

Q. You admit that is in his handwriting?

A. Yes sir.

Q. You have now no independent recollection of when he wrote it in?

A. My recollection is now he wrote it in in court.

Q. And your recollection is I would be correct on that?

A. I would not say it was done by direction of the court. He wrote it in court I think.

Q. You think he brought the order over without those
426 words in it?

A. I think so.

Q. And that he wrote it in court?

A. I think so, yes.

Q. And as to the question of his writing it on the court's order you have no recollection?

A. No, I will not say he did or did not.

Q. On that question you simply say you don't know?

A. Yes.

Q. Do you know whether I presented a decree at the same time or later in the day?

A. I think the decree came in later.

Q. Did not the Judge at that time direct me to prepare the decree?

A. I think you did prepare the decree.

Q. Didn't the judge direct me to prepare the decree?

A. I do not remember about that.

Q. You would not dispute my statement on that point that the Judge directed me to prepare the decree?

A. No sir. The judge directed the decree to be prepared; by which side I do not remember.

Q. You would not dispute my statement on that subject?

A. No.

Q. Do you have any independent recollection of being present when the decree was signed that I prepared?

A. Looking at the papers now I would say that the papers were signed at the same time of the decree.

Q. In view of the fact that you say you do recollect the Judge's directing a decree to be prepared at the time when this motion or order was signed, in which the words were inserted by Judge Moody, is it not very likely the decree was prepared after that?

A. Yes, very likely in the afternoon.

Q. Have you any independent recollection of being present when I presented that decree for signature?

A. No, not the decree.

Q. Didn't you think at the signing of the order and conclusion of our argument your presence in court was not necessary?
A. Yes sir.
Q. And you would not say you were present when I presented the decree to the judge for signature?
The COURT: He answered that. He said No.
WITNESS: I would not say I was.

Also please print the omitted testimony of G. C. Moody as found in said bill of exceptions in the record here, at page 126a of said bill of exceptions and at pages 291 to 293 of said printed abstract used in South Dakota Supreme Court as aforesaid, as follows, to-wit:

427 Counsel for plaintiff also here offered in evidence in rebuttal the testimony of G. C. Moody (now deceased) as taken upon the former trial and as appearing on the transcript of the evidence thereof, at pages 127 to 129, as follows:

G. C. MOODY being called and duly sworn on behalf of the plaintiff testified as follows, upon examination of Mr. E. W. Martin.

Q. Judge, you were one of the counsel for the plaintiff, Mr. McPherson, in the suit in the Federal court to which reference has been made were you?
A. Yes sir.
Q. Were you participating in and had you knowledge of the proceedings in that case from the time of its inception to its close?
A. Yes sir.
Q. Please state to the court whether or not the merits involved in that controversy were gone into or examined by the court in connection with those proceedings?

(Counsel for the defendants objects; the record must speak for itself, and any attempt to amplify or explain that record in any manner will be incompetent testimony and improper in this case. This objection was overruled by the court and an exception noted.)

A. They were not.

Motion was made by the plaintiff to dismiss.
(Counsel for the defendants objects to the statement of what was done because the record shows that.
By the COURT: That motion perhaps shows for itself.
Plaintiff excepts.
This objection was urged at this present trial and sustained by the court to which plaintiff excepts.)

Q. Was there any evidence taken in the case on either side, Judge Moody?
A. Not that was submitted to the court.
Q. Was there any evidence submitted to the court on either side?
A. No sir.
Q. Were there any issues of fact or of law upon the pleadings

submitted to the court, save the issue upon the demurrer of the defendant to the complaint of the plaintiff, in which the order overruling is in the record?

(The objection in the transcript upon the former trial was "Counsel for the defendant objects as wholly immaterial and incompetent in order to explain the record made by the court. Overruled; exception."

This objection was renewed upon this trial and the objection was overruled by the court and exception taken by defendants.)

428 A. There were no issues submitted at any time and none passed upon by the court.

(Upon the former trial counsel for defendant made the same objection and the latter part is a legal conclusion. This was overruled and exception taken. The objection was renewed upon this trial and the same ruling made and exception taken by defendants.)

Q. You may state Judge what was the reason and purpose of that dismissal?

(Upon the former trial counsel for defendants objected because the reason is stated fully in Mr. McPherson's affidavit and return to the order to show cause, and furthermore it would be wholly incompetent for this witness at this time to state any other or further reasons for that dismissal except what appears on the court record. This was overruled pro forma at the previous trial, but on renewal at this trial the objection was sustained by the court and plaintiff excepted.)

On cross-examination by Mr. Van Cise this witness testified as now read from the transcript, as follows:

Q. I call your attention, Judge Moody, to an order of dismissal made by Judge Thomas in the Circuit Court of the District of South Dakota, Western Division, appearing among the files of this judgment roll, in this case to which you have referred, which has been introduced in evidence, and call your attention to the words at the conclusion thereof, "Let decree be entered accordingly," and ask if that is not your handwriting?

A. I couldn't say positively; the word "accordingly" I should say was my handwriting.

Q. Isn't the word "Let" in your handwriting; isn't that the way you make an "L"?

A. Really I don't often write it that way.

Q. What would be your impression, Judge?

A. My impression is that it is my handwriting; I am not certain though.

Q. That is your impression?

A. Yes.

Also please print the omitted testimony of Witness Van Cise when recalled on behalf of defendant Swift, as found in said bill of excep-

tions beginning at page 129 thereof and also in said printed abstract used in Supreme Court of South Dakota at pages 297-298 thereof, as follows:

429 EDWIN VAN CISE, being here recalled on behalf of defendants, and examined by Mr. Wood, testified as follows:

Q. You were present in the court room when Mr. McPherson the plaintiff was testifying to-day?
A. Yes sir.
Q. Did you hear him make this answer to a question asked: "The Court in granting our application to dismiss in a jocular way remarked to Mr. Van Cise that by the dismissal of our suit based upon my affidavit he would attain the same result as by the granting of the order; that is, he would have me as a partner." You heard him so testify?
A. Yes sir.
Q. Were you present at the time in Federal court Mr. McPherson alluded to; at the time he refers to?
A. I must have been, if it was when the order of dismissal was signed.
Q. Did you hear Judge Thomas make any such remark?
A. No.
Q. Did Judge Thomas make any such remark at that time?
A. I never heard Judge Thomas make any such remark. I think if there had been such a remark made I should have heard it, because that is just what I wanted. My client wanted a partnership then.

(Objected to, that part of the answer not responsive—Objection sustained; exception.)

Q. You did not hear Judge Thomas make any such remark as that?
A. No sir.
Q. Is there anything further you would like to state?
A. I would like to state the reason why I feel so positive why such a remark was not made.

(The COURT: They object to that.)

Mr. WOOD:

Q. I will ask you to state what reasons you have for now asserting positively that no such remark as that was made by Judge Thomas at that time?
A. Because that was just what I wanted and what I was instructed to get if I could. If that remark had been made I should have responded, "That is just what we wanted." But we did not think we were getting it; but a decree of dismissal.
Q. And then the Court remarked as you stated this forenoon?
A. Yes sir.

(Plaintiff objects as not rebuttal. Sustained; exception.)

Respectfully submitted,
September 29, 1913.

430 WILLIAM H. BECK,
1403 *H St., Washington, D. C.;*
EDWIN VAN CISE,
*Equitable Building, Denver, Colorado;*
FRANK L. GRANT,
*Same Address;*
PHILIP S. VAN CISE,
*Same Address,*
*Attorneys for Plaintiff in Error.*

Service of the foregoing request for printing of additional parts of the record admitted by receipt of a copy thereof, at Denver, Colorado, this 29th day of September, A. D. 1913.

CHAMBERS KELLAR,
JAS. G. STANLEY,
*Attorneys for Defendants in Error,*
*Residing at Lead City, So. Dak.*

431 [Endorsed:] 77/22827. Supreme Court of the United States, October Term, 1913. No. 77. Joseph Swift, Plaintiff in Error, vs. Donald A. McPherson, Defendant in Error. Additional Parts of Record Designated for Printing by Plaintiff in Error.

432 [Endorsed:] File No. 22,827. Supreme Court U. S., October term, 1913. Term No. 77. Joseph Swift, Pl'ff in Error, vs. Donald A. McPherson. Designation by plaintiff in error of additional parts of record to be printed, and proof of service of same. Filed October 4, 1913.

In the Supreme Court of the United States.

No. 77.

JOSEPH SWIFT, Plaintiff in Error,
vs.
DONALD A. MCPHERSON, Defendant in Error.

*Statement and Designation of Additional Parts of the Record which Defendant in Error Thinks Material.*

Comes now Donald A. McPherson, defendant in error in the above entitled cause and states that in view of the recent printing of additional transcript of the evidence at the request of plaintiff in error, which was not included in the portions of the record originally designated by the plaintiff in error, it now becomes necessary, in the opinion of defendant in error, to print further and additional parts of the record in this case, and therefore the defendant in error hereby designates the following additional parts of the record in this case which he thinks material and which he requests to have printed as a part of the record upon which the writ of errer herein shall be heard, to-wit:

Testimony of Edwin Van Cise, as found in said bill of exceptions on pages 128 and 128*a* and a portion of 129 thereof, and also in said printed abstract used in the Supreme Court of South Dakota at pages 293–296 thereof, as follows:

EDWIN VAN CISE recalled as a witness by Mr. Kellar, testified as follows:

Q. I call your attention to transcript of the evidence in the proceedings of the trial court at the previous trial of this case immediately following the testimony of Judge Moody, which has just been read in this trial, and ask you whether or not that transcript correctly shows that nothing further was done at that time in the way of striking out that evidence?

A. Nothing except what appears there.

Q. To refresh your recollection, is it not a fact that subsequent to the time Judge McGee tried the case, he concluded to strike out that evidence, and then the evidence was supposed to be stricken out, and upon that theory you made your bill of exceptions?

A. I made the motion to strike out at the close of your testimony, I think.

Q. Do you find anything of that in that transcript?

A. No.

Q. Isn't this the transcript taken?

A. I think so; you told me so.

Q. This is the one from which we made up the bill of exceptions?

A. I think likely. Mr. Kellar prepared the bill of exceptions in this case. I was living in Denver. He sent me a carbon copy I have

here. At the close of that case I find the following: (Plaintiff objects to counsel reading this in answer to question, as not responsive. The COURT: I do not think we are interested in that bill of exceptions in any way. I do not think that ought to go in nor the testimony immediately preceding it. Strike out the last examination of Mr. Van Cise, the whole of his testimony on his last recall.)

By Mr. KELLAR:

Q. As a matter of fact at the close of the case in the trial before and after the admission of Judge Moody's testimony, did you at that time, at the close of the evidence before you rested, ask the court to strike out that testimony?

A. My recollection is that I did. I know I received a letter from Judge McGee in which he said: "Your motion to strike out will be sustained"; that was some time after the trial before he settled findings of fact and conclusions of law.

Q. Don't you know it to be a fact that after Judge McGee went to Rapid you had correspondence with the judge and that the jud-e told you or wrote you that he had concluded he ought not to have admitted Judge Moody's testimony, and he therefore would strike it out?

A. No. I had correspondence with him to the extent of one letter.

Q. Why did Judge McGee write you after he had gone to Rapid City, after the trial of the case, that he had concluded to strike out evidence, if, as a matter of fact, he had struck it out at the trial?

A. Because he left the motion undetermined.

Q. When the trial was concluded, the motion to strike out the evidence had not been decided?

A. I think it had not been decided at once. A good many rulings of Judge McGee were left pro forma, and at the conclusion I made that motion.

Q. And the cross-examination of Judge Moody you have introduced in evidence was that all *the cross-examination of Judge Moody you have introduced in evidence, was that all* the cross-examination you made of Judge Moody at the last trial?

A. I have no recollection of any other.

Q. You did not offer at the last trial your own testimony you have given in this trial or the testimony of any other witness as to what transpired in the presence of Judge Thomas at the argument and dismissal of the federal court case, did you?

A. I did not.

Cross-examination by Mr. WOOD:

Q. State your reason?

A. For the reason that I was so confident the testimony was incompetent. I told several attorneys at the time—— (Objected to and sustained. The COURT: That is sufficient that you deemed it incompetent.)

It is stipulated by counsel that Judge G. C. Moody, whose evidence has just been read from the previous trial, died some four or five years ago.

Defendant in error requests that the additional parts of the record hereinbefore set forth be printed as a part of the record in this case immediately following the word "yes" on the third line from the bottom of page 44 of the additional transcript of record printed at the request of the plaintiff in error herein.

Respectfully submitted,

CHAMBERS KELLAR,
NORMAN T. MASON,
*Attorneys for Defendant in Error.*

Dated October 20, 1913.

[Endorsed:] File No. 22,827. Supreme Court U. S. October term, 1913. Term No. 77. Joseph Swift, Pl'ff in Error, vs. Donald A. McPherson. Statement and designation of additional parts of the record which defendant in error thinks material. Filed October 25, 1913

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# In the Supreme Court

## OF THE

# UNITED STATES.

OCTOBER TERM, 1913.

No. 77.

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JOSEPH SWIFT, *Plaintiff in Error,*

*v.*

DONALD M'PHERSON, *Defendant in Error.*

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*In Error to the Supreme Court of the State of South Dakota.*

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## BRIEF OF PLAINTIFF IN ERROR.

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### Statement of Case.

In advance of a statement of the issues, we give a chronology of events in this case, assuming as facts for the purpose, the admitted averments of the pleadings, including the verified answer in the federal court where verification of the answer had not been waived.

Joseph Swift, the defendant below, held the legal title to the property in controversy, by virtue of a recorded deed bearing date May 8, 1888. Having such title, Swift on May 14, 1888, entered into a contract concerning it at New York, signed as of that date, and witnessed, but not appearing to have been acknowledged or recorded. Swift contends this was a mere contract of agency or employment, terminable at will, and that it terminated upon the death of the second party, which was followed by the open and admitted assertion of an exclusive title by Swift and a continuous and exclusive adverse possession by him ever since. As this instrument is the first "bone of contention" here and as we insist it was later construed in the federal court in our favor, we will set it out here in full (Additional Transcript of Record, pp. 7-8):

CONTRACT SUED ON.

"This contract, between Joseph Swift of Essex County, State of New Jersey, party of the first part, and James K. P. Miller, of Deadwood, Lawrence County, Dakota, party of the second part, witnesseth:

"That Whereas the said party of the second part has purchased for the said party of the first part, and for joint account, the property situated in the City of Deadwood, Lawrence County, D. T., known as the Hawke Mineral Claim, comprising U. S. Mineral Claims numbered forty-five and fifty-three excepting certain portions not deeded to said Swift *as shown from his deed from Vehmeyer on record at Register of Deeds office, Lawrence County, D. T.*

"*And in consideration of the said party of the second part looking after said property*, collecting the rents, attending to all the necessary repairs, paying taxes, insurance, etc., the said party of the first part agrees *that the said party of the second part shall receive for*

*said services one-half of all the net profits, from said property, first deducting from said profits eight per cent per annum interest* on the eighteen thousand, five hundred dollars paid therefor. The said party of the second part *to remit* to the said party of the first part *monthly, or as fast as collected, the said interest* and his half of the profits; and furthermore, in consideration of the said party of the second part *agreeing to pay to the said party of the first part one-half of any ultimate loss* that may occur on said purchase price of eighteen thousand five hundred dollars the said party of the first part agrees that the said party of the second part shall receive *one-half of the profits ultimately accruing from the sale* of said property above the said purchase price of eighteen thousand five hundred dollars.

"The said party of the second part agrees that in case there be no income on the investment, owing to the property lying vacant of tenants at any time, to settle with and remit to the said party of the first part at least once each six months eight per cent interest on one-half of the said purchase price of eighteen thousand five hundred dollars.

*"Each party hereto pays in cash when due one-half of all costs upon said property for taxes, insurance, repairs or other necessary expenses.*

"All money realized from sales of any part of said property shall be remitted to said party of the first part and credited upon said sum of eighteen thousand five hundred dollars purchase money, in liquidation thereof and stopping the eight per cent interest to extent of such credits.

"Additional investments for improvements subject to same conditions."

Miller died January 12, 1891, insolvent, and owing debts to the amount of more than $100,000 (Ibid p. 2, par. 4). He left a will dated November 22, 1890, devising his property to Swift and associates as trustees, for purposes stated, (Ibid p. 15), which was admitted to

probate February 24th, 1891 (Ibid p. 15), and the trustees qualified as executors (p. 20). Upon Miller's death, Swift at once employed another agent to care for this property (p. 22), repudiated and denied that the estate had any interest in it (p. 11), and appropriated all the rents, issues and income collected to his own use (p. 9, par. 8, and p. 18, par. 8). On May 23, 1892, the executors were removed and one Selbie appointed as administrator with the will annexed (p. 12).

On September 29, 1892, the county court made an order for the sale of the assumed Miller estate interest in the contract and the property, and the administrator subsequently reported a sale as made to McPherson, and on December 31, 1892, the court assumed to confirm this sale (Ibid p. 3). From the order of confirmation and order overruling Swift's objections and protest, an appeal was duly taken to the circuit court (p. 3). On January 11, 1893, the appeal still pending, the administrator executed a deed purporting to convey to McPherson the interest of the Miller estate in this contract and in the property (p. 3).

## PROCEEDINGS IN FEDERAL COURT.

On May 20, 1893, McPherson began his action in State court, upon the contract of May 14, 1888, and administrator's deed of January 11, 1893. This action was removed to the United States Circuit Court for South Dakota, where plaintiff filed a new bill of complaint. This may be abridged as follows (Additional Transcript, pp. 7-14):

*Bill of Complaint.*

1. Allegations of diverse citizenship.

2. That on or about May 14, 1888, plaintiff's "assignor" Miller, and defendant Swift executed an agreement in writing (set out in full).

3. That on January 12, 1891, Miller died, having property in Lawrence County; that on May 23, 1892, one Selbie was appointed and qualified as administrator, and by his appointment *"became and was vested and charged with all the interest which said Miller had in the contract * * * and in the property therein described."*

4. That Miller died owing debts of more than $100,000, his estate was insolvent and in debt that amount, and it was necessary to sell real property to pay debts, including the property described in the agreement.

5. That on September 29, 1892, the county court made its order of sale, a sale was made to plaintiff of the Miller estate interest in contract and property, the sale confirmed December 29, 1892, and deed executed to McPherson January 11, 1893.

6. That "upon information and belief" Miller performed all the conditions of said contract upon his part.

7. That a portion of said property is occupied and improved, a part not.

8. "Upon information and belief *that defendant since the death of said Miller has been collecting all rents and income from said property and applying the same to his own use.*" Then follows an allegation that Swift took title to a half interest in trust for Miller and holds the same in trust for McPherson as his successor, and that he wants an accounting.

9. That on May 20, 1893, and before bringing this action, plaintiff had tendered Swift $9,250, leaving with him a written tender and demand (set out) assuming to be "the beneficiary and purchaser of the contract" between Swift and Miller "of date May 14, 1888, relating to the property therein described," and stating: "I hereby tender you the sum of $9,250 in lawful money * * * which is the sum apparently due by said McPherson upon said contract in order to entitle him to the full benefit thereof, and at the same time, * * * request * * * you to execute to him the conveyance for an undivided one-half of said property which I now hand you." This tender was followed by an allegation of presentation of a quit-claim deed therewith for execution and the refusal of Swift to accept the tender or execute the deed. And this follows: "That upon such refusal by the defendant, the said one-half of the purchase price of the property, to-wit, $9,250 was by this plaintiff deposited in the First National Bank of Deadwood, South Dakota, where the same now remains *subject to the order of the defendant herein;* that this plaintiff now offers to pay the defendant one-half, if any, of all taxes or other expenditures made by the defendant upon said property which have not already been paid to him from the income thereof, with interest thereon, and this plaintiff will bring the money into court for that purpose at any time during the progress of this litigation." Then this follows: "And plaintiff offers to bring the money into court, heretofore tendered the said defendant, and deposited in said bank, for the use of said defendant, or so much thereof as may be found due to him upon an accounting had as hereinafter demanded, and also to pay to him any other or further sum which may be due said defendant under said contract:

10. That there have been good demand and opportunities to sell the property, and it could have been sold for its full value at almost any time since the death of Miller, and it could now be sold for a price largely in excess of purchase price of $18,500, but that defendant neglects and refuses, etc., but "on the contrary *has since the decease of the said James K. P. Miller repeatedly repudiated the right and claim of said estate and of this plaintiff in and to said property* or the proceeds thereof or any portion of the same, and *still repudiates and denies the interest of the plaintiff and the former interest of the estate therein*, and has claimed and is claiming that said property belongs to himself, the defendant, in his individual right to be held or disposed of according to the defendant's pleasure; *that since the death of said James K. P. Miller, the defendant has asserted and still asserts a claim adverse to the rights and interest of said plaintiff's assignor* in said property; that on or about February 24, 1891, letters testamentary were issued * * that defendant Joseph Swith and his co-executors *wholly neglected and refused to inventory the contract as an asset * * but on the contrary asserted that the said estate had no right or interest in said contract, claiming the same as the property of the said Swift.*" Then follows an allegation of removal of the executors upon their return, declining to inventory this *and other contracts* because advised the estate had no interest in them.

11. That Selbie as administrator had made an offer to Swift in writing (set out) to act as his agent in the care of the property, collect rents, etc., and fulfill the obligations of Miller, etc.

12. That defendant refuses plaintiff any part or participation in the property or control over it, and un-

less enjoined will sell and deny the estate and plaintiff any share of the proceeds; and plaintiff has no plain, speedy or adequate remedy at law, and the claim of defendant is without right, etc.

Prayer (1) that defendant be decreed to hold a half interest in trust for plaintiff, (2) enjoined from asserting any adverse claim thereto, (3) be removed from his trust and a receiver appointed to sell the property, report to the court the proceeds for division, or a partition be made as shall appear best; (4) that defendant be required to execute a deed to plaintiff for a half interest; (5) account for the rents, profit and income, and (6) for general relief.

This bill of complaint was verified by McPherson in the usual form, true as to positive allegations, believed to be true as to others.

*There was no waiver of a verified answer.*

A demurrer on general grounds was interposed and overruled (Addl. Trans., p. 14). Thereupon an answer was filed as follows (Ibid, pp. 14-25):

*Answer of Swift.*

This may be condensed as follows, following the numbering of paragraphs as in the bill of complaint:

(1) Admitted the diverse citizenship.

(2) Admitted the making of the contract "under the circumstances and upon the representations hereinafter set forth."

(3) Admitted the death of Miller, but denied information or belief as to court proceedings and Selbie's alleged appointment, and positive denial that either Selbie or Miller or the estate ever had any interest in the contract or the property described, and if Miller had any it passed by his will to defendant and his associates.

Beecher and Swift as trustees, for uses and purposes in his will set forth.

(4) Admitted the indebtedness and insolvency of Miller and his estate; but denied the power or authority of Selbie as administrator to make sale of the real property in controversy.

(5) This was an elaborate denial of the legality of each specific step in the proceedings of the administrator and county court to sell and convey to McPherson an undivided one-half interest in the contract of May 14, 1888, and the property therein described; also an allegation that Selbie, the administrator, was directly interested in the so-called sale of an interest in the contract and property; and that defendant filed objections and protest, which were overruled, and from all these orders and the order of confirmation, he took an appeal to the circuit court of Lawrence County, which was then pending. And that plaintiff had no title that could be pleaded or enforced in this court.

(6) Denied that Miller had performed all or any of the conditions of the contract, except the collection of money from rents and attention to the payment of some taxes, etc., therefrom, *or from funds of Swift otherwise coming into his hands.* He denied that Miller remitted or paid to him the interest as agreed; denied that the real property was purchased by Miller and alleged that it was purchased by defendant from Vehmeyer.

(7) Admitted part of the property to be occupied and improved, part not.

(8) Admitted that since the death of Miller he (Swift) had been collecting all rents and income and applying the same to his own use, as he has good right to. Denied that title was taken for the joint interest of

Miller and himself, but alleged that he took deed therefor on May 8, 1888, before the contract was entered into; denied that he had at any time held a half interest in trust for Miller or for McPherson as his successor or otherwise. Denied specifically all other allegations of the eighth paragraph of the bill. He then stated an account of debits and credits beginning with the purchase price of the property, $18,500, computing unpaid interest generously without monthly or even half yearly rests, and charging to investment the moneys paid for taxes and improvements, making a total (after crediting a $2,300 sale) of $33,434.03, and after deducting all rents, collected, declaring a balance due of $29,116.10, on his investment. He alleged that this would have been increased by a strict computation of interest, and addition of some omitted items, and submitted the account as subject to further charges which he might ask leave to add.

(9) Admitted the tender, written offer and request to sign deed, and his refusal.

(10) The allegation as to good demand and opportunity to sell, he put in issue by a denial on information and belief, and alleged there was no demand or opportunity to sell at any reasonable price. Admitted he had not accounted; that since the death of Miller he had denied any claim of right in the property both of the estate and of plaintiff; and that he had claimed and still claims the property belongs to him in his individual right to be held and disposed of according to his own pleasure. Admitted that since the death of Miller he had asserted and still asserts a claim to the property adverse to the estate. Admitted the probate of Miller's will, issue of letters testamentary to himself and associates; alleged that they took the office with a view to compli-

ance with state statutes apart entirely from the discharge of their duties as trustees, which he did not believe could be controlled by the county court. Admitted the contract sued on was not inventoried as an asset of the estate, and that he asserted the estate had no right or interest in it. Admitted the citation by county court, the return filed by him and his associates, and alleged that it was a proper return, and admitted their removal as executors, but denied they had been removed from their office as trustees, or that they had resigned or renounced their trust. Everything not admitted was put in issue.

(11) He admitted receiving a notice from some one of the character set out in paragraph 11 of the bill (administrator's offer to act as agent), but as his agent was entirely satisfactory he made no reply.

(12) Admitted refusing plaintiff any part or participation in the property, etc.; admitted that in case of sale he would apply the proceeds to his own use and deny the estate any share, though he saw no market then and had no inclination to sell. Admitted his nonresidence, and denied the other allegations of the twelfth paragraph of the bill attempting to state grounds for equitable relief.

(13) That the contract was wholly without consideration, was procured from defendant by means of sundry misrepresentations, only recently brought to his knowledge, and which would render it void. But even if valid it was entered into after his purchase of the property, was merely a contract of personal employment, subject to be revoked at his pleasure or at the pleasure of Miller, and was revoked by his death; that it was only an agency, not coupled with any power or interest, and that Miller had no interest therein that

could pass to his heirs or legal representatives, and that the agency terminated at Miller's death, etc.

(14) That said contract was without consideration, and was secured by means of misrepresentations on the part of Miller and suppression of material facts fully and elaborately set out. Briefly, these were, that Miller had represented himself as solvent and responsible for losses if they should occur ultimately under the contract, when this was not true and defendant would not have signed if he had known the truth; and that Miller had further represented Swift was buying the property at $18,500 without commission, when the truth was Miller received and retained a commission of $750 from Vehmeyer, the seller, for making sale to Swift, and that Swift would not have signed the contract if he had known this; but relying upon these representations as true, etc., and having confidence in Miller's integrity and fidelity, etc., he was induced to make him his agent by the contract of May 14, 1888. But by reason of these misrepresentations as to solvency and responsibility, suppression of the fact that he was agent for the seller, Vehmeyer, and receiving a commission of $750 from him, etc., Miller had practiced a fraud and deception on him and the contract was wholly void.

The answer was verified by Swift in the form required by state statute, that he had "read the foregoing answer and the same is true of my own knowledge except as to statements therein made on information and belief, and as to them I believe it to be true."

*The replication* filed August 6, 1894, was in the form used in the federal court signed by attorneys but without verification. (Addl. Trans., p. 25.)

*Application of Swift to Settle.*

The next proceeding in this cause in federal court, as set forth in the thirteenth finding (addl. trans., pp. 25-7) is a petition of Swift, verified by one of his attorneys September 25, 1895, and addressed to the judges of the court, setting forth that the suit had been begun by summons dated May 18, 1893, and served about the same date, removed to federal court, and an amended bill of complaint served August 11, 1893, demurrer interposed and overruled in May, 1894; then the duly verified answer of Swift, filed July 13, 1894, and replication August 6, 1894. That since joining issue plaintiff has not taken any evidence or testimony whatever nor obtained an order of this court to try the case on oral testimony, nor has plaintiff or his solicitors taken any steps to comply with Rule 69 of the rules of practice of this court, or amendments thereto, or indicated a purpose or desire to try this case or prepare the same for trial. That this suit has now been pending over two years and four months; that defendant is exceedingly anxious to dispose of it; that he has made frequent overtures and offers to plaintiff and his solicitors to settle the same by admitting plaintiff to a joint ownership in the property described, upon his accounting equitably to defendant for moneys expended in the purchase, protection and improvement thereof. And petitioner now renews his offer, and asks leave to withdraw from his answer paragraphs 13 and 14 thereof and submit to a decree in plaintiff's favor on such terms as the court may find equitable and just. The prayer was that defendant might be allowed to withdraw from his answer the paragraphs named, and the cause be referred to a master to take testimony and make an accounting between the

parties to the suit, touching the real property in controversy, and the moneys paid out by defendant on account thereof, and received by him as rents, revenues and returns therefrom, and report to this court, to the end that this court may ascertain the amount plaintiff shall pay to defendant as a condition of relief, and that a decree may then be entered accordingly. The verification was specific and positive as to everything, except defendant's offer to plaintiff; but alleged affiant's personal offer to plaintiff's attorney, his authority to make this offer; and as the reason for delay in not making it sooner, that he and defendant had believed a settlement could be had out of court.

*The Order to Show Cause.*

This is the next proceeding (addl. trans., p. 27), based upon the foregoing petition, issued by the then judge, September 26, 1895, and made returnable September 27, 1895. This recited the substance of the petition and directed plaintiff to show cause why the prayer of the petition should not be granted, or other order be made in the premises as might be meet and according to equity.

*The McPherson Return and Retraxit.*

The next statement of this thirteenth finding (addl. trans., p. 27) is that the postponed hearing of said order to show cause was had at the next term of court February 22, 1896. *"The plaintiff McPherson in said action filed the following affidavit and return to said order to show cause."* As this is very important in the consideration of the "federal question" we submit it with very little abbreviation (addl. trans., pp. 27-29):

"Donald A. McPherson, the complainant in the above entitled cause, being duly sworn, says in answer

to the petition of the defendant attached to the order to show cause herein, that he has moved this honorable court to dismiss the bill of complaint herein and desires to have such bill of complaint dismissed for the following among other reasons: The *offer and tender of the purchase price for the property involved in this controversy was long since withdrawn by affiant*, and was so withdrawn before the procurement of said order to show cause. *When the tender was made to the defendant by affiant's direction, the property in controversy was of very considerable value*, so much so that if affiant's demand had been complied with by the defendant, as it ought to have been, at the time of such tender, *and affiant given an interest in said property*, it could have been sold for a sum which would have realized the price which affiant was willing to pay therefor, and a considerable profit in addition, but the defendant refused to accept the tender and *refused to give affiant any interest whatever in said property*, and refused to carry out such contract and denied that plaintiff was entitled to any interest whatever in said contract.

"Affiant further says that afterward, and before the order to show cause was procured in this case, *the property in controversy was very much depreciated in value*, and would not have sold and will not now sell, and is not worth in the market near the amount *which affiant was willing to pay therefor*. Therefore, defendant having declined to receive the tender, *or to give affiant any interest in said property whatever*, denying to him any right to dispose of the same and refusing himself to dispose of it, or any portion of it, this affiant did not deem it incumbent upon him to leave so large an amount of money idle, nor did he feel himself bound in any wise to make another tender, *or to pay the price which he was willing to pay therefor, while said property was of value.*

"Affiant further says that the only offer which the defendant has ever made to this affiant to accept this affiant as a co-owner in said property, or to carry out the contract set out in the bill of complaint in this cause, has

been accompanied by so gross and unreasonable an account for expenditures in caring for the property as to indicate to affiant that *if he became a co-owner with the defendant in the title to the property* he would be constantly harassed by unjust and outrageous claims made as pretended expenditures for the care of said property and the collection of the income therefrom.

"Affiant further says the account which was handed to affiant by the agents of said defendant contained charges amounting to $6,182.07, for the collection of rents upon said property amounting to $5,841.86, and containing other like charges for pretended expenditures, which satisfied this affiant that under no circumstances which could be seen and understood by affiant would it be possible to escape *constant annoyance, litigation and loss by becoming a part owner of said property with the defendant.*

"Affiant further says that the defendant himself, subsequent to this account being handed to affiant, admitted to affiant and stated that there were one or two thousand dollars of charges in the account which undoubtedly were incorrect and wrong.

"Affiant further says that at no time has the defendant tendered or offered *to execute and deliver to this affiant any conveyance to the one-half interest in said property,* or for any portion thereof, or to give him any reasonable information, or to exhibit to him any vouchers for any expenditures which he has made with reference to said property.

"Affiant further says that the contract * * * does not require this affiant to pay any part of the purchase money for said property, *but the same is to be paid at affiant's option out of the proceeds of the sales thereof.* Affiant was willing at the time, nevertheless, to pay all that said Miller could possibly be under obligations to pay at any time, and *take the title to himself of his share of the property* to the end that it might be disposed of while the ruling and market rates for said property were of the character which affiant

has indicated, and which would have paid both of the parties a fair profit; but since defendant's *refusal to convey for an unreasonable time, and the depreciation of the value of the property,* affiant is not willing now to exceed the strict letter of the contract with reference to the mode and manner of reimbursing the said defendant for the original purchase price thereof.

"Wherefore, the complainant prays this court to discharge the order to show cause and dismiss the bill of complaint herein, as prayed for in his motion.

(Signed) "DONALD A. MCPHERSON."

"Subscribed and sworn to before me this 19th day of February, A. D. 1896. J. S. Denman, notary public."

*Attorney's Motion to Dismiss.*

The next proceeding is stated in the finding (Addl. Trans., p. 29): "On the same day, February 22, 1896, the solicitors for complainant McPherson filed in said court their motion as follows: Now comes the said complainant by * * his solicitors, and moves this honorable court to dismiss the bill of complaint heretofore filed herein in the above entitled cause." (Dated, Deadwood, S. D., February 18, 1896, and signed by solicitors.)

*Order for Dismissal and Decree.*

The next recital is (Ibid, p. 29), "On the same day, February 22, 1896, the court made the following order, to-wit:

"Upon reading and filing the foregoing motion of the complainant to dismiss his bill of complaint herein it is by the court considered and ordered that said motion be and it is hereby granted, and the complainant's bill of complaint is dismissed at complainant's costs. *Let decree be entered accordingly.* Done in open court this 22nd day of February, A. D. 1896. By the court. Alfred D. Thomas, judge.

"Defendant duly excepted to this order on this 22nd day of Feb., 1896. Alfred D. Thomas, judge."

All of the foregoing was in typewriting except the words, "Let decree be entered accordingly," inserted in pen and ink by Attorney Moody upon direction of the court, the date, "22nd," the signature, "Alfred D. Thomas," and the exception and signature, "Deft. duly excepted to this order on this 22nd day of Feb., 1896. Alfred D. Thomas, Judge." (See Addl. Trans., pp. 41-2, p. 44, Main Trans., p. 92.)

The next entry is: "On the same day, February 22, 1896, the court signed and entered the following decree:"

*Decree in Federal Court.*

"*This cause coming on to be heard* upon the application of the defendant, Joseph Swift, for leave to withdraw from his answer now on the files of this court, paragraphs 13 and 14 thereof, and submit to a decree in plaintiff's favor on such terms as may be found equitable and just and upon the order granted September 26th, 1895, by the judge of this court, requiring the plaintiff or his solicitors to show cause why defendant should not be allowed to withdraw from his answer said paragraphs 13 and 14 thereof, and this cause be referred to the master in chancery of this court or some special master to be agreed upon between the parties, to take testimony and make an accounting between the parties to this suit touching the real property in controversy, and the moneys paid out by defendant on account thereof and interest thereon, and the rents, revenues and returns received by defendant therefrom, and report the same to this court, *or such other order be made in the premises as might be meet and according to equity; and the same being now heard* before this court upon the petition of Joseph Swift, verified by his solicitor, Edwin Van Cise, upon which said order to show cause was based, and upon the resisting affidavit

of the plaintiff, Donald A. McPherson, this day submitted and filed; and at the same time the complainant, by his solicitors, filing his motion in this court to dismiss his bill of complaint heretofore filed herein in this case, the complainant, Donald A. McPherson, appearing by his solicitors, * * * and the defendant, by his solicitor, * * * and *the court having heard the matters in controversy upon the affidavits aforesaid, and the bill of complaint, verified answer* and replication, on file herein, *and being fully advised in the premises.*

"It is now ordered, that the application of the defendant be and the same is hereby denied, and the order to show cause granted September 26th, 1895, be and the same is hereby vacated and discharged.

*"It is further ordered, considered, adjudged and decreed, that this suit and the bill of complaint heretofore filed herein on behalf of the complainant and against the defendant be and the same is hereby dismissed.*

"It is further ordered and adjudged, that defendant have and recover of and from the complainant, Donald A. McPherson, the costs of this suit, taxed at $30.30. Done this 22nd day of February, A. D. 1896. By the court. Alfred D. Thomas, judge.

"To which order and decree counsel for defendant duly excepted, Feb. 22, 1896. Alfred D. Thomas, judge."

## FIVE YEARS' DELAY.

After the entry of this decree, both parties seem to have acquiesced for over five years. Swift took no appeal (Main Trans., p. 95); McPherson took none. The property seems, however, to have appreciated in value and sales to the amount of $56,436.76 been made by Swift (see account stated in court's finding, Main Trans., p. 48), presumably by his own and his agent's efforts, a finding to the contrary notwithstanding (Ibid, p. 51).

## THE PRESENT ACTION BEGUN.

On June 17, 1901, McPherson began his present action in the State court.

### *The New Complaint*

is substantially as before (Trans. of Record, pp. 1-7) setting out the contract, alleging the death of Miller insolvent, county court proceedings merging in administrator's deed, that Miller performed all conditions, etc., that defendant since the death of Miller has been collecting all rents, etc., that he should have a balance to divide with plaintiff; the offer of administrator to serve as agent, etc., etc. Instead of the tender an allegation (11) is made that prior to the bringing of the action *plaintiff had demanded of Swift a deed for a half interest and an accounting* but Swift had refused. The prayer asked for an accounting, decree quieting title to a half interest, partition, and general relief (verified).

### *The Answer of Swift.*

This contained the admissions and denials of his answer in federal court, also his affirmative pleas and defenses made there, and in addition the plea in bar based on the proceedings in federal court and its decree, to-wit, estoppel by conduct, *retraxit* and *res adjudicata;* an allegation (8) that the sales were made long after plaintiff had renounced his claim by dismissal of a former action in which a tender had been made, but when accepted by Swift, was declared withdrawn, and plaintiff then consented to an adverse decree. And (14) that the contract was without consideration, etc., same as 13 in federal court; (15) same as par. 14 in federal court answer; (16) the plea of estoppel by conduct, *retraxit* and *res adjudicata*, based on proceedings in federal court;

then the "federal question," pleaded at length—that there is drawn in question the validity of an authority exercised under the United States, etc., in entering its court's final decree of February 22, 1896; also the validity of an authority exercised under this state for its courts to question the finality of said decree, and use an authority repugnant to the constitution and laws of the United States, and operating to impair the obligation of said decree as a contract (Sec. X, Article I of the Constitution), and also to deny to said decree the full faith and credit, etc. (Sec. I of Article IV of the Constitution); and also to deprive defendant of his property in said decree, etc., without due process of law and deny defendant the equal protection of the laws (Article XIV of the Amendments), etc., etc., etc., and that defendant specially sets up and claims said right, privilege and immunity, etc., and that said decree was final, etc., etc., and that if the trial court and appellate court should hold otherwise, their decision would be subject to review, etc.; by the supreme court of the United States, upon a writ of error, etc., etc., etc. The answer then concluded with defenses proper in State court: (17) That after this decree, plaintiff frequently, in an open and public manner, disavowed and disclaimed any interest in the property, and defendant, relying thereon, and on said decree, had expended large sums in improvements, which enhanced the value of the property, and as a result he has sold and leased parts of it, and enhanced the value of the remainder, and pleads that plaintiff ought not now to be permitted to reinstate or reassert his claim of interest, etc. (18) That plaintiff has been guilty of laches and neglect, etc. (19) That defendant has been in the open, notorious, exclusive and uninterrupted possession of the property since his purchase May 8, 1888, and has duly

made payment of all taxes legally assessed thereon. Then follows a very full plea of adverse possession, to the knowledge of plaintiff, invoking both the general statute of limitations and the special statute for tax payers passed in 1891.

*First Trial.*

Upon the first trial of this action there was a judgment and decree for defendant, from which an appeal was taken to the State Supreme Court and a reversal entered there with directions to remand for a new trial. See opinion of April, 1908 (Trans. of Record, pp. 63-71).

*Second Trial.*

On a second trial the defendant relied largely, as before, on the judgment roll and record from the federal court, made a part of the court's decision in its thirteenth finding of fact set out pretty fully *ante* (Addl. Trans. of Record, pp. 6-30).

*Some Parol Testimony.*

The State court in its reversal on the former appeal, having stated as one of its principal grounds (Trans. of Record, p. 69), that "the court below erred in excluding parol evidence offered by plaintiff to prove that there was not in fact any determination of the issues involved"—the attorneys for defendant accepted this as "the law of the case," so far as the state courts were concerned. It had been upon our motion that the offered evidence was excluded at the first trial—basing our objection on the ruling of this court announced in Fayerweather v. Ritch, 195 U. S. 276, 307, that "testimony of the trial judge given six years after the case had been disposed of, in respect to the matters he con-

sidered and passed upon was obviously incompetent." But the state court holding as above stated, on the first appeal, that the exclusion of testimony of this kind from the plaintiff's attorney was error, we acquiesced, and at the second trial, when plaintiff closed without re-offering this testimony, defendant's attorney was called and questioned as to what occurred at the time of signing the order for dismissal, and signing and entering the decree. In our first designation of parts of the record desired to be printed, we did not go behind the findings of fact and conclusions of law and our objections thereto and offers in lieu thereof, understanding the practice of this court to be not to go behind the written decision made by a trial court under a statute (S. D. Comp. Laws, Sec. 5069); and feeling therefore obliged to rely upon the contents of the thirteenth finding, setting out the judgment roll and record of the federal court and the inferences of finality necessarily deducible therefrom. But the learned counsel for defendant in error, without notice to us (seeming not to be required by Rule 10, subd. 9), requested the printing of parts of this testimony, omitting, however, some parts we regard as very material. So soon as we received the main transcript and noticed this testimony as printed, we asked the Clerk to print the omitted parts. This has been done as follows: A part of the testimony of defendant's attorney, all of the cross-examination of plaintiff, all of the testimony of plaintiff's attorney, and the testimony of defendant's attorney on recall. If any of this testimony is proper to be considered, it should all be before this Court. It is now here, as an additional transcript of the record. We select from the two transcripts the important portions in the order given upon the trial.

From Transcript of Record, p. 91-2: Edwin Van Cise, on behalf of defendant testified as follows: "I reside in Denver, Colorado; resided in Deadwood, South Dakota, from March, 1879, to August, 1900; I was attorney for defendant from the time the case of McPherson v. Swift, formerly pending in federal court, was brought. I practiced law in Deadwood during the whole time of my residence there, and have been practicing in Denver since. I have been connected with this litigation from the beginning, as attorney for Joseph Swift. I have the judgment roll or record of that federal court case in my hands at present. The decree is here, dismissing the action." In answer to a question regarding the words *"Let decree be entered accordingly,"* at the close of the order of dismissal, the witness answered: "The order to show cause was obtained upon my application; and then upon the hearing, after argument by Judge Moody and myself, the court denied our application, contained in the affidavit upon which the order to show cause was based, and said that he would grant a dismissal of the action. This order Judge Moody prepared—at least he brought into court the order in which the words are written in pen, referred to in your question. When the order was brought into court, those words in pen were not contained in it. Judge Thomas took the order and looked at it and said: 'You can add these words, Judge Moody, *"Let decree be entered accordingly;'* " and Judge Moody said, 'It is not to be a final matter?' or something like that. And Judge Thomas said: 'O, yes, we want an end made of this matter right now,' or words to that effect. Judge Moody then wrote those words in: *'Let decree be entered accordingly.'* Judge Thomas inserted the date and signed his name."

Here we supply the continuation of this testimony from our designation (Addl. Trans. of Record, p. 40):

The witness continued: "Judge Thomas said: 'O, yes, it is to be a final matter. You write those words,' and added: 'You, Mr. Van Cise, will prepare the decree.' That is the proceeding which was had on the return of the order to show cause which the defendant procured. * * I prepared the decree in my own office, and took it in (is my recollection now), the afternoon of the same day. It is dated the same day, and it is my recollection the order prepared by Judge Moody was presented on the morning of that day, the 22nd day of February, and I went back to my office and prepared the decree and presented it in the afternoon of February 22, 1896. The decree prepared and submitted on that day, and which was entered on that day, is the one introduced in evidence here, showing a dismissal of that federal court action. Judge Moody represented the plaintiff at the time. I do not recollect that any one else was there. Both at the time of the entry of the order, and I think also, at the time the decree was presented for the judge's signature, he declined Judge Moody's application to insert the words, 'Without prejudice,' and also declined my application to insert the words, 'On the merits.' He said to Judge Moody: 'We want to make an end of this litigation.' To me he said, in Judge Moody's hearing: 'It is not necessary to enter the words, "On the merits," in a judgment in a federal court. Look at your federal decisions; they are uniform. The words, "On the merits" are not necessary to its finality.' I prepared the decree under that instruction from the court, A. D. Thomas, judge."

Then follows from Main Transcript of Record, pp. 92-5:

"On cross-examination the witness testifies as follows: 'This order was signed by Judge Thomas, in the then place of meeting of the federal court, in the city hall, corner of Main and a cross street, on second floor. My recollection would be that the order was signed in

the morning. I am not sure. I notice the return to the order to show cause was verified by Mr. McPherson, February 19th, and was filed on the 22nd. It may be from that, the order I refer to bearing date the same day was signed at the afternoon hour and then my decree before adjournment that day. This decree was signed in same place, federal court room, in open court, on the afternoon of the same day the order was signed. I do not know that any one of the parties was present when this colloquy took place except Judge Moody and myself, beside Judge Thomas. Mr. McPherson might have been present when the argument was made on the return to the order to show cause. * * I do not think he was present, nor Mr. Martin present, when the order I refer to was signed or the decree was signed. Mr. Martin was associated with Judge Moody as attorney for the plaintiff, and had been from its commencement; but in this proceeding, at the end, Judge Moody took the active part. Q. At which one of these sessions, now do you say that this conversation took place, in which Judge Thomas is claimed to have said he would not insert the words, 'Without prejudice,' because he wanted to have an end of the litigation, and would not insert the words, 'On the merits,' because it was not necessary under the practice; was that at the time the order was signed in the morning, or subsequently at the time the decree was signed? A. It was both at the time the order was signed and when the decree was signed. Q. The matter then came up twice? A. Yes, sir. Q. Why did you suggest to the judge the desirability of having the words, 'Upon the merits' put in the decree in the afternoon, if the judge had already told you he would not do it, in the morning? A. I would not be sure about the morning and afternoon. Both might have occurred in the afternoon. Q. I ask why you asked to have it done, if he had in the morning refused,—saying it was not necessary to be done? A. When the order of dismissal was signed it was Judge Moody made the request. He submitted that order as it

was, and when Judge Thomas said to add the words, 'Let decree be entered accordingly,' Judge Moody wanted to add 'without prejudice;" and Judge Thomas said: 'O, no, this is to be a final disposition of this matter.' Then I said, I can draw the decree and insert the words, 'On the merits.' 'No,' he said, 'it is not necessary.' When I presented it for his signature he said: 'This is all you can ask.' I said: 'No, we would much rather have had Mr. McPherson for a partner. If this decree is to be entered I would rather have the words, "On the merits" in.' He said: 'It is not necessary. Look at your federal decisions.' Q. You did not call the court's attention to the fact that the customary decree in federal courts in an equity case where there is a dismissal upon the merits is in the language that the bill is without equity? A. No. Q. And you did not suggest that in lieu of the words, 'Upon the merits,' ordinarily used in practice in state courts, the words equivalent thereto in federal practice,—'The bill being without equity?' A. No. Q. He did not suggest that? A. No, sir. Q. Or 'the court finding there is no equity in the bill?' A. No. Q. You were familiar with the equity practice at that time? A. Not very familiar with federal court practice, I must say. Q. As I understand it Judge Moody prepared this order? A. Yes, sir. Q. And you subsequently prepared the decree? A. Yes, I did. Q. Did that question as to the phraseology of the order to be drawn, whether the order was to be a dismissal upon the merits or without prejudice, come up at the conclusion of the argument? A. No, it came up first when the order was presented. Q. At the conclusion of the argument, then, there was simply a decision, by his honor, Judge Thomas, that he would grant the motion of the plaintiff which had just been argued and which is presented in this judgment roll you have offered in evidence and you now hold in your hand? A. His oral decision was to deny my application and grant Judge

Moody's application to dismiss. I am not sure as to the matter of time; that might have been the day before. Q. And thereupon Judge Moody prepared the order himself? A. Yes, he brought it into court. I presume he prepared it. He brought it into court in my presence. Q. There is no where in this order, as originally drawn by Judge Moody, any expression or phrase which has been interlined or marked out or anything like that? A. No. It is all in typewriting except the words *'Let decree be entered accordingly.'* And the date, 22nd, I think was inserted by Judge Thomas; and that is all in Judge Thomas' handwriting,—the exception. I asked for an exception. Q. You immediately took exception to that order? A. Yes, sir. Q. And you also took exception to the decree which his honor, Judge Thomas, entered subsequently? A. Yes, sir.

"By the Court: I suppose before making the order to dismiss, or the decree dismissing the complaint, that there was no evidence submitted to the court sustaining the allegations of the complaint or answer? A. The recital in the judgment is correct. It was based upon the affidavits and pleadings. There was no waiver of verified answer. The answer was verified by defendant. The case had been pending for over three years. There was no extension granted or asked. The time had long passed for taking testimony and no extension asked or granted. When I took the exception I expected to take an appeal; but none, however, was taken, and the judgment and decree has remained in force for whatever it purports to be ever since."

Then from Transcript of Record, designations of defendant in error (pp. 95-6): Plaintiff presented the following rebuttal testimony: D. A. McPherson testified as follows:

"Q. Were you present in the United States court in 1896 at the time that order dismissing the bill

of complaint in the case of yourself against Joseph Swift, a record of which is introduced in evidence here at this trial, at the time it was signed by Judge Thomas? A. I was, every minute. * * Q. Were you also present when the motion was argued? A. I was. Q. That was a double motion, a motion of the defendant, Joseph Swift, to withdraw parts of his answer and another motion for leave to dismiss your bill of complaint? A. Yes. Q. You were represented in that matter by Judge G. C. Moody and Mr. E. W. Martin? A. Yes, sir. My recollection is the order was signed the following morning after argument. The argument was in the forenoon and the papers were disposed of the next day forenoon. I went to court with Judge Moody at the time the order was signed. Q. Did Judge Moody have the order with him at the time? A. That is my recollection. Q. And you and Judge Moody were together in court at the time the order was signed by Judge Thomas? A. We were. Q. You heard the testimony of Mr. Van Cise with reference to certain statements claimed to have been made by Judge Thomas at the time of the signing of that order by him? A. Yes, sir. Q. You may state to the court whether or not any such statements were made at that time by Judge Thomas? A. Not a syllable. Q. You say you were present during the entire argument of the motion—the two motions in court? A. I was. Q. You may state whether anything was said by Judge Thomas at the time that he granted your motion to dismiss the bill? A. The only remark Judge Thomas made upon it was something like this: Mr. Van Cise was contending for the withdrawal of the affirmative defense, number something—13 and 14—and made a motion to accept me as a partner in the proposition provided I would pay one-half of the money. That we declined to do. The other motion based on my affidavit was argued some time and resisted by Mr. Van Cise. The court in granting our application to dismiss in a jocular way re-

marked to Mr. Van Cise that by the dismissal of my suit, based upon my affidavit, he was attaining the same result as by the granting of his order. That is, he would get me as a partner. Q. That was the remark that Judge Thomas made to Mr. Van Cise? A. Yes, sir; may not have been that exact language, but that was the meaning of his language. I will say further there was not a word uttered as to the proceeding being final in that case."

Then pass to the designation by attorneys for plaintiff in error (Addl. Trans. of Record, pp. 41-3): On cross-examination by Mr. Van Cise this witness testified as follows: I think the argument on those motions was probably on the day previous to the date of the signing of the order. I do not remember the date. I think it was the previous day. I was there at that time. Q. Do you remember as to the affidavit you made whether that was taken over and filed about the same time? A. Yes. Q. This is the affidavit signed by you? A. Yes. Q. In which you ask leave to dismiss the action? A. Yes, that is my signature. Q. That is probably verified the day it bears date? A. I think so. Q. It was taken over and filed about the time of that order? A. I think so. Q. And you went there with Judge Moody when he went to make that argument? A. Yes, I either went there with him, or was there. Q. You were there in court when the affidavit was read by him to the court? A. Yes, sir, every minute. Q. And you heard my argument and his? A. Yes, I heard both of them. Q. And you think you were there on the following day when Judge Moody took the order over? A. Yes, sir. Q. Mr. Martin was not there? A. I have no distinct recollection about Mr. Martin. Q. Judge Moody had taken the active part in that matter at that time? A. Yes, sir. Q. I call your attention to the motion to dismiss the case, and ask you if Judge Moody did not sign both of those names—E. W. Martin and G. C. Moody? A. That is his writing of both. Q. I call your attention to the order made: Are

not the words, *"Let decree be entered accordingly," in Judge Moody's handwriting? A. Yes, sir.* Q. Were you there when that was written by him—do you recollect anything about it? A. I cannot recall that incident especially? Q. You would not be disposed to dispute the correctness of my statement that he entered those words by the order of Judge Thomas—that Judge Thomas told him to write those words in? A. I doubt it. Q. *Would you dispute my statement that Judge Thomas directed him? A. No. Q. You say, as a matter of fact, that is Judge Moody's handwriting? A. Yes. Q. You admit that is in his handwriting? A. Yes, sir. Q. You have now no independent recollection of when he wrote it in? A. My recollection is now he wrote it in in court. Q. And your recollection is I would be correct on that? A. I would not say it was done by direction of the court. He wrote it in court I think. Q. You think he brought the order over without these words in it? A. I think so. Q. And that he wrote it in in court? A. I think so, yes. Q. And as to the question of his writing it on the court's order you have no recollection? A. No, I will not say he did or did not. Q. On that question you simply say you do not know? A. Yes. Q. Do you know whether I presented a decree at the same time or later in the day? A. I think the decree came in later. Q. Did not the judge at that time direct me to prepare the decree? A. I think you did prepare the decree. Q. Didn't the judge direct me to prepare the decree? A. I do not remember about that. Q. You would not dispute my statement on that point, that the judge directed me to prepare the decree? A. No, sir. The judge directed the decree to be prepared, by which side I do not remember. Q. You would not dispute my statement on that subject? A. No.* * * * Q. In view of the fact that you say you do recollect the judge's directing a decree to be prepared at the time when this motion or order was signed, in which the words were

inserted by Judge Moody, *is it not very likely the decree was prepared after that? A. Yes, very likely in the afternoon. Q. Have you any independent recollection of being present when I presented that decree for signature? A. No, not the decree. Q. Didn't you think at the signing of the order and conclusion of our argument your presence in court was not necessary? A. Yes, sir. Q. And you would not say you were present when I presented the decree to the judge for signature?* The Court: He answered that. He said no. Witness: *I would not say I was.*

Then follows further from the designation of plaintiff in error (Addl. Trans. of Record, p. 43):

Counsel for plaintiff also here offered in evidence in rebuttal the testimony of G. C. Moody (now deceased) as taken upon the former trial on behalf of plaintiff and appearing on the transcript of the evidence thereof, at pages 127 to 129, as follows:

Q. Judge, you were one of the counsel for the plaintiff, Mr. McPherson, in the suit in the Federal court to which reference has been made, were you? A. Yes, sir. Q. Were you participating in and had you knowledge of the proceedings in that case from the time of its inception to its close? A. Yes, sir. Q. Please state to the court whether or not the merits involved in that controversy were gone into or examined by the court in connection with those proceedings. (Counsel for the defendants objects; the record must speak for itself, and any attempt to amplify or explain that record in any manner will be incompetent testimony and improper in this case. This objection was overruled by the court and an exception noted.) A. They were not. Motion was made by the plaintiff to dismiss. Q. Was there any evidence taken in the case on either side, Judge Moody? A. Not that was submitted to the court? Q. Was there any evidence submitted to the court on either side? A.

No, sir. Q. Were there any issues of fact or of law upon the pleadings submitted to the court, save the issue upon the demurrer of the defendant to the complaint of the plaintiff, in which the order overruling is in the record? (Objection in the transcript upon the former trial was "Counsel for the defendant objects as wholly immaterial and incompetent; an attempt to explain the record made by the court." Overruled; exception. This objection was renewed upon this trial, and the objection was overruled by the court, and exception taken by defendant.) A. There were no issues submitted at any time and none passed upon by the court. (Upon the former trial counsel for defendant made the same objection and that the latter part is a legal conclusion. This was overruled and exception taken. The objection was renewed upon this trial and the same ruling made and exception taken by defendants.)

On cross-examination by Mr. Van Cise this witness testified as now read from the transcript, as follows: Q. I call your attention, Judge Moody, to an order of dismissal made by Judge Thomas, * * * appearing among the files of this judgment roll, in this case, to which you have referred, which has been introduced in evidence, and call your attention to the words at the conclusion thereof, *"Let decree be entered accordingly," and ask if this is not your handwriting? A. I couldn't say positively; the word "accordingly" I should say was my handwriting. Q. Isn't the word "Let" in your handwriting? Isn't that the way you make an "L"? A. Really, I don't often write it that way. Q. What would be your impression, Judge? A. My impression is that it is my handwriting; I am not certain, though. Q. That is your impression? A. Yes.*

And this further from designation of plaintiff in error (Addl. Trans. of Record, pp. 44-5):

Edwin Van Cise, being here recalled on behalf of defendants, and examined by Mr. Wood, testified as follows: Q. You were present in the court room when Mr. McPherson, the plaintiff, was testifying today? A. Yes, sir. Q. Did you hear him make this answer to a question asked: "The court in granting our application to dismiss in a jocular way remarked to Mr. Van Cise that by the dismissal of our suit based upon my affidavit he would attain the same result as by the granting of the order; that is, he would have me as a partner." You heard him so testify? A. Yes, sir. Q. Were you present at the time in Federal Court Mr. McPherson alluded to at the time he refers to? A. I must have been if it was when the order of dismissal was signed. Q. Did you hear Judge Thomas make any such remark? A. No. Q. Did Judge Thomas make any such remark at that time? A. I never heard Judge Thomas make any such remark. I think if there had been such a remark made I should have heard it, because that is just what I wanted. Q. You did not hear Judge Thomas make any such remark as that? A. No, sir. Q. I will ask you to state what reasons you have for now asserting positively that no such remark as that was made by Judge Thomas at that time? A. Because that was just what I wanted, and what I was instructed to get if I could. If that remark had been made I should have responded, "That is just what we want." But we did not think we were getting it; but a decree of dismissal.

*Trial Court Decision.*

The trial judge, feeling bound by the decision of the State Supreme Court of April 9, 1908, as the "law of the case," overruled our "Objections to the Findings and Conclusions offered by Plaintiff and our Requests for Findings and Conclusions by Defendant" (Transcript of Record, pp. 25-43); and adopted as its decision the findings and conclusions so objected to and as offered

by attorneys for the plaintiff (Addl. Trans. of Record, pp. 1-32). We abridge this:

*The Findings of Fact.*

These are, as might be expected under such circumstances, as favorable to plaintiff as possible. The execution of the contract is stated as of its date, and that it was not procured from Swift by Miller upon any fraudulent representations nor after secret commission paid to him by the seller of the property,—although the State Supreme Court in its earlier opinion (Transcript of Record, p. 64) said "no evidence was offered in support of such allegations," and it is presumable if not offered then it was not offered at the later trial. Hence the negative finding was based not on evidence, but want of it.

Those which follow are substantially specific findings in favor of the plaintiff in the case, upon the issues tendered by him, concluding with an omnibus finding (No. 18) "that the allegations of the complaint are true and that the allegations of defendant's answer, *except as otherwise specifically found and stated in the foregoing findings* are untrue."

The exceptions referred to and some other findings which we may refer to in our argument as intimately connected with the federal question, are as follows:

No. 1. Just alluded to *supra*.

No. 2. * * * That Selbie continued to act as administrator, and that said letters have not been revoked. That Selbie by his appointment became and was vested, etc.

No. 4. The insolvency of Miller and of his estate and indebtedness of over $100,000.

No. 5 recites as duly made the order by county court for the sale of the Miller contract and property, the sale by the administrator to McPherson of all interest of the Miller estate in the contract and premises and deed to McPherson of date January 11, 1893, as conveying to McPherson the estate's interest in the contract and premises.

No. 6. That after making adminstrator's sale and report, a hearing was had in county court, where Swift's attorney appeared and filed a protest and objections, but sale was confirmed.

No. 7. That Swift duly prosecuted an appeal to the circuit court of Lawrence County, South Dakota, from the order confirming sale and denying his objections and protest; that Swift dismissed this appeal in the spring of 1895.

No. 11. That "since the death of Miller, Swift has been collecting all the rents, incomes, issues, and profits of said property and has also collected and received the proceeds of all sales of such portions of said property as have been sold." Then follows the account in a very general statement and method of calculating interest not according to contract.

No. 12. The demand for deed before bringing suit. (Why if plaintiff the absolute owner, as stated in conclusion of law No. 2?)

No. 13. This is the important finding upon which the "federal question" is based as it sets out the pleadings, proceedings and decree of the United States Circuit Court, pleaded in our answer as an estoppel by conduct, *retraxit* and *res adjudicata*. This is introduced as follows: "That on May 20, 1893, the plaintiff, Donald A. McPherson, began an action against the defendant,

Joseph Swift, *upon this same contract, and for the same relief as now sought in this action.* The former action was begun in this court. * * * Thereafter the defendant Swift duly removed such action to the circuit court of the United States for the district of South Dakota. Afterwards by leave of said court an amended bill of complaint was filed * * * as follows: Here follow the pleadings and proceedings in federal court *seriatim* concluding with the decree (see *ante* and Addl. Trans., pp. 1-30).

The 14th finding contradicts the 13th (Addl. Trans., p. 31) in stating "That no evidence, testimony or proof was ever taken or submitted in said action upon the hearing of said motion of defendant Joseph Swift * * * nor upon the hearing of said motion of the complainant Donald A. McPherson for leave to dismiss his bill of complaint, * * * and there was no hearing or trial * * * upon the merits and that said bill of complaint * * * was not dismissed upon the merits nor for want of equity." (This is more a conclusion of law than a finding of fact.)

The 15th finding recites—also more of a conclusion (Addl. Trans., p. 31) "that McPherson did not openly or otherwise abandon or renounce his claim or cause of action * * * and a dismissal * * * is not a bar to this present suit." (This to deny our plea of *retraxit.*)

The 16th finding denied plaintiff's avowal of disclaimer after the decree, denied that Swift made any improvements, and denied that any enhanced or increased value had occurred by reason of any efforts, labors or expenditures by Swift (p. 31).

The 17th denied Swift's open, notorious or exclusive possession, and declared his possession to be as a

trustee until appointment of Selbie as administrator, etc. (p. 31).

The 18th was the omnibus finding for plaintiff and against defendant, already referred to (p. 32).

*The Conclusions of Law.*

These are brief (Addl. Trans., p. 32): (1) That plaintiff is entitled to judgment against defendant for $11,187.56 with interest and costs. (2) That plaintiff should be adjudged the absolute owner in fee to an undivided one-half interest in the real property remaining unsold, and the rents, etc. (3) That defendant Swift and all persons claiming or to claim, etc., be perpetually enjoined, etc., from asserting any right, title, interest, etc. Let judgment be entered accordingly.

*The Objections and Offers.*

The defendant, in accordance with the state practice, filed objections to the greater part of the findings of fact (Trans. of Record, pp. 25-39), on the ground of insufficiency of the evidence to support, conflict with other findings, mere attempted conclusions of law, etc., etc. To the extent of being in conflict, and mere conclusions of law, we will make comments in our argument *infra*. We also offered findings in lieu of those offered for plaintiff. Our proposed findings were rejected, and objections overruled, and proper exceptions taken and certified. So were our exceptions to the findings and conclusions adopted by the court (Addl. Trans., p. 32). We also objected specifically to the court's conclusions of law, and suggested conclusions in lieu thereof in accordance with the State practice (Trans. of Record, pp. 39-43). These objections were overruled and our offered conclusions rejected, and exceptions noted. As some of these offered conclusions may be a subject of

consideration here we give an abridgment: (1) That Swift was at all times after May 8, 1888, the owner in fee of the premises described; (2) That the instrument of May 14, 1888, was a mere contract of employment with contingent interest in the profits, based on a promise to share the losses, did not constitute a partnership nor a power coupled with an interest and terminated at Miller's death; (3) That even if otherwise, Swift repudiated on and after January 12, 1891, and McPherson on and after February 22, 1896. (4) That the county court proceedings culminating in deed of January 11, 1893, were void for divers reasons given. (5) They were void for want of a statutory bond, illegality in proceedings and the pendency of appeal when deed was executed. (6) The offer of administrator to act as agent was a purely individual matter, etc. (7) The policy of the administrator to claim an interest only in the contracts in which he thought there was a profit, was a theory of selection that was inequitable. (8) The conduct of McPherson in abandoning other contracts purchased showed this investment to be purely speculative and wanting in equity. (9) The possession of the premises by Swift was personal and individual; Miller merely an agent, not a partner, nor holding any power coupled with an interest. (15) The bar of the state general statute of limitations. (16) The bar of a special state statute. (18) The plaintiff guilty of laches. (19) The acts and conduct of plaintiff wanting in equity. (20) If Miller ever had any title it passed by his will to devisees in trust, etc.

*The Federal Question Raised.*

This was distinctly raised by the following offered conclusions of law: (10) The construction and legal effect of the agreement of May 14, 1888, was an issue

in the federal court, and by its decree of February 22, 1896, said agreement was construed adversely to the contention of plaintiff and favorably to the contention of defendant Swift. (11) Forasmuch as the verified answer was considered as evidence in the federal court, the paragraphs 13 and 14, and all other matters of denial, answer and averment therein, were given the legal effect in rendering the decree of February 22, 1896, accorded them in the federal practice. (12) The acts, declarations and conduct of plaintiff leading up to the decree of February 22, 1896, constituted a deliberate choice and election of remedies, with full knowledge of his rights, and of the facts, and such election bars plaintiff from maintaining this action for the same relief he sought in the other, and which on February 22, 1896, he asked and induced the court to deny. (13) The filing by plaintiff personally of his voluntary verified application to dismiss on February 22, 1896, was a *retraxit*, etc., and constitutes a bar to the maintenance of the present action. (14) The decree of February 22, 1896, was a final adjudication on the merits and constitutes a bar. (17) There is a federal question involved here, to-wit, the construction and legal effect of the decree of February 22, 1896, to which full faith and credit must be given by this court, and said decree be held a final adjudication and bar. (21) The plaintiff is not entitled to recover, and defendant is entitled to a dismissal on the merits and at plaintiff's costs.

The foregoing proposed conclusions (Trans. of Record, pp. 40-42) were rejected and exception taken (p. 43).

*The Judgment of the Trial Court.*

This was in accordance with the conclusions of law (Trans. of Record, p. 53). (1) For $11,711.81 and

costs; (2) plaintiff the absolute owner in fee of a half interest in the unsold parts of the real property described, with rents and revenues; (3) defendant Swift and all persons claiming or to claim, etc., perpetually enjoined, etc., from asserting, etc., title, etc., to said half interest or interfering therewith.

*The Motion for New Trial and Denial.*

A motion for new trial was made in accordance with the state practice (Trans. of Record, p. 55). This was denied (p. 56), and exception noted (p. 57). An appeal was then taken to the State Supreme Court, from the judgment of the trial court, and its order overruling the motion for a new trial (p. 57).

*Judgment of Affirmance.*

The State Supreme Court heard the appeal at the October term, 1910, "upon the merits of the case, and without oral argument, and the court having advised thereon and filed its decision in writing," thereupon "It is considered, ordered and adjudged, that the judgment and order of the circuit court within and for Lawrence County be and the same is hereby affirmed, and it is further ordered, that this action be * * * remanded * * * for further proceedings according to law, and the decision of this court; and * * * that respondent have and recover of the appellant costs," etc. (p. 58).

A petition for rehearing was filed and denied (Trans. of Record, pp. 70-7).

The present writ of error is prosecuted to secure in this Honorable Court a review of that judgment of the South Dakota Supreme Court.

## SPECIFICATION OF ERRORS RELIED UPON.

We will abridge these (Trans. of Record, pp. 79-88):

I. The Supreme Court of South Dakota erred in affirming the judgment and decree of the trial court and its order denying the motion for a new trial, for that thereby said court, *as indicated by its decision and opinion, filed March 29, 1911*:

(a) Denied the validity and effect of the proceedings and decree of dismissal of the circuit court of the United States for the district of South Dakota of February 22, 1896, as a final adjudication in favor of defendant Swift, and a basis of his pleas of estoppel, *retraxit* and *res adjudicata*.

(b) Sustained the authority of a state trial court, and also exercised its own authority, repugnant to the constitution and laws of the United States, to dispute and deny the force and effect of said proceedings and decree as a final adjudication in Swift's favor.

(c) Denied to said Swift the title, right, privilege and immunity claimed by him under Section X of Article I of the Constitution and impaired the obligation of said decree in his favor as a contract;

(d) Denied to said decree of February 22, 1896, and the proceedings leading up to and merging therein, the full faith and credit to which they were entitled in the trial court, and in the appellate court, under Section I of Article IV of said Constitution;

(e) Deprived said Swift of his property, to-wit, said decree of February 22, 1896,—and the full value, force and effect thereof as a final adjudication, estoppel and bar,—without due process of law, against the pro-

visions of Articles V and XIV of the amendments to said Constitution; and

(f) Denied to said Swift the equal protection of the laws guaranteed to him by Article XIV of the amendments to said Constitution.

(The foregoing specification covers assignments Nos. 1 to 21 inclusive.)

II. The said court erred in affirming the judgment and decree of the trial court, and thereby *approving its findings of fact*, when said findings, other than No. 13, so approved, were inconsistent with, and in contradiction of said finding No. 13 (setting forth the judicial proceedings in federal court merging in the decree of February 22, 1896). and their adoption and approval disregarded, disapproved and denied the force and effect of the judicial record set forth in said finding No. 13 and denied to plaintiff in error the title, rights, privileges and immunities claimed by him under the Constitution and laws of the United States as aforesaid.

(The foregoing covers assignments Nos. 22 to 35 inclusive.)

III. The said court erred in affirming the judgment and decree of the trial court, and *thereby approving its conclusions of law*, for that the complaint does not support said conclusions, the findings of fact as controlled by finding No. 13 do not support said conclusions, and the conclusions constitute a denial of Swift's title, rights, privileges and immunities pleaded and claimed by him under the Constitution and laws of the United States as aforesaid.

(This will cover assignments Nos. 36 to 39 inclusive.)

IV. The said court erred in affirming the judgment and decree of the trial court, *and thereby approv-*

*ing its rejection of Swift's offered conclusions of law,* for that they correctly stated the law, and were based upon the pleadings and proper findings, and especially finding No. 13 and the judicial proceedings contained therein; and by reason of the court's approval of the rejection of said offered conclusions, Swift was denied the benefits and advantages of the decree of February 22, 1896, and of the proceedings leading up to and merging therein, and of the title, rights, privileges and immunities set up and claimed by him in his answer, under the Constitution and laws of the United States aforesaid.

(This will cover assignments Nos. 40 to 53 inclusive.)

V. The said court erred in affirming *the decision and decree of the trial court generally,* for that the findings—other than No. 13, the first sentence of No. 11, the first sentence of No. 7, and a few isolated sentences elsewhere,—were erroneous, the conclusions each and every of them erroneous, and said decision and decree operated to impair the obligation of Swift's contract, to-wit, the decree of February 22, 1896, and also to deny to the judicial proceedings and decree of February 22, 1896, the full faith and credit to which they were entitled, and also to deprive said Swift of his property without due process of law; and also to deny him the equal protection of the laws,—and thus deprive him of the title, rights, privileges and immunities pleaded and claimed by him in his answer under the Constitution and laws of the United States.

(This will cover assignments Nos. 54 to 60 and others.)

VI. The said court erred in affirming the judgment of the trial court aforesaid, for that therein and

thereby in express terms and necessary effect *the court decided the federal questions raised against the defendant* Joseph Swift, and denied to him the rights, privileges and immunities claimed by him under the Constitution and laws of the United States *and such decision and judgment was not based on any independent ground* not involving a federal question broad enough to maintain the same, nor was it possible to render a judgment against the defendant Swift without passing upon the federal questions raised by him and deciding the same adversely to him.

(The foregoing will cover to some extent all the errors assigned.)

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## BRIEF OF ARGUMENT.

We have made our opening statement quite full that the issues may be placed before this Court as clearly as possible. The "federal question" involved is the construction of certain judicial proceedings in the former case in the United States Circuit Court for the District of South Dakota, merging in a decree of dismissal, February 22, 1896, which the trial court in this pending case found to be an action brought by McPherson against Swift *"upon this same contract and for the same relief as now sought in this action"* (Trans. of Record, p. 50). We so pleaded it at length (Ibid. par. 16 of answer, pp. 15-23). This "federal question" was also raised by our offered conclusions of law (following the state practice), Nos. 10, 11, 12, 13, 14, 17 and 21 (Ibid., pp. 40-42). The conclusions adopted by the trial court did not directly pass upon this issue, but did indirectly in its findings of fact in contradicting No. 13 by Nos. 14 and 15 (Ibid., p. 50). The appellate court did not in terms

pass on the question in its judgment of affirmance, but as this recites the court as "having advised thereon and filed its decision in writing" (Ibid., p. 56), in accordance with the state law,—we have referred to it in the assignments of error on which our first specification is based—finding sanction therefor in many cases decided in this Court.

Fire As. of Phila. v. New York, 119 U. S. 110.

The "federal question" was also urged again before the State Supreme Court in our petition for rehearing (p. 77). Indeed, we do not think it will be questioned here that the "federal question" was distinctly and prominently an issue, and that, as stated in our last specification, the court in express terms and necessary effect decided it against plaintiff in error, and that its judgment was not based on any independent ground, not involving a federal question broad enough to maintain the same, nor was it possible to render a judgment against Swift without passing upon the federal question raised by him and deciding the same adversely to him (p. 88).

Detroit R. R. Co. v. Guthard, 114 U. S. 133.
Anderson v. Calkins, 135 U. S. 483, 486.
Murdock v. Memphis, 20 Wall. 590.

"No particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court."

Canal Co. v. Paper Co., 172 U. S. 58, 67-8.
R. R. Co. v. Homestead Co., 123 U. S. 552.
R. R. Co. v. Chicago, 166 U. S. 226, 231.
Chambers v. R. R. Co., 207 U. S. 142.
Sullivan v. Texas, Ibid 416.

Am. Ex. Co. v. Mullins, 212 U. S. 311.
Elder v. Horeshoe M. & M. Co., 194 U. S. 248.

The last case came here from South Dakota. There was no reference to a federal question in either pleadings, decision or opinion of the court, but this Court took jurisdiction and decided the case on its merits.

The judgment of the state court made no allusion to our pleas; the opinion but very scant reference. But the rule is that ignoring the "federal question" constitutes a decision against it.

Chapman v. Crane, 123 U. S. 540.
R. R. Co. v. Chicago, 166 U. S. 226.
Ins. Co. v. Needles, 113 U. S. 574.

It should be stated here, that while the complaint in the present action alleges that the administrator "became and was vested" with all the interest Miller had in the contract and property (Trans., p. 2), and that the county court proceedings and administrator's deed transferred to McPherson all the estate's interest in the contract and premises (p. 3), and that plaintiff is the absolute owner and entitled to the possession of an undivided one-half interest (p. 4), and prayer for a decree to that effect, and would thus appear as intended to be a suit to quiet title;—yet its inconsistent allegations "this plaintiff's assignor"—not grantor (p. 1)—the demand for a conveyance of a half interest before bringing the action (p. 5), and the allegation of adverse possession by Swift of the whole property since January 12, 1891, and also that he holds title to an undivided half interest as trustee for the plaintiff (p. 3)—are so utterly inconsistent with the others, that the complaint must be construed as an action for specific performance. This view is confirmed by the fact that the action in federal court

was for specific performance, that the title was there treated as wholly in Swift, by the allegations of the bill, the written tender and demand for deed, and the prayer for relief, and by iterated and reiterated statements in the sworn return of McPherson to the order to show cause. This view must be accepted even by attorneys for defendant in error, notwithstanding the language of their judgment (p. 53), as shown by their introduction to the thirteenth finding, "that on May 20, 1893, the plaintiff * * * began an action against the defendant * * * upon this same contract and *for the same relief as now sought* in this action;" and also by their account, recognizing defendant's sales made under a claim of title adverse, amounting to $56,436.76 (p. 48) (presumptively upon his personal deed), of which after deduction they take judgment for a share (p. 53). Further, the statutes of South Dakota did not authorize the sale of an interest in a contract otherwise than as follows (South Dakota Comp. Laws, 1887, in force at the time of the alleged sale):

§ 5848. "If a decedent at the time of his death was possessed of a contract for the purchase of land, his interests in such land and under such contract may be sold on the application of his executor or administrator in the same manner as if he had died seized of such land * * * except as hereinafter provided.

§ 5849. "The sale must be made subject to all payments that may hereafter become due on such contracts, and if there are any such, the sale must not be confirmed * * * until the purchasers execute a bond * * *.

§ 5850. "The bond must be conditioned that the purchaser will make all payments for such land that become due after the date of sale, and will fully indemnify, * * *.

§ 5851. "Upon the confirmation of the sale the executor or administrator must execute to the purchaser an assignment of the contract which vests in the purchaser, his heirs and assigns, all the right, title and interest of the estate, * * * and the purchaser has the same rights and remedies against the vendor of such land as the decedent would have had if he were living * * *."

There is no provision whatever in the statutes for the sale of an interest in such a contract as we have here; but assuming (for the purpose of the argument only), that Miller had an interest which could be the subject of sale, there could not be a title transferred by deed, but only an assignment of the interest in the contract; and such an inchoate, equitable interest could not be made the foundation of an action to quiet title against a party in exclusive, adverse possession under a claim of title and right. There may be exceptions in some code states in the case of unoccupied land, but we believe the authorities are pretty well agreed that such an action will not lie against a party in adverse possession. "Those only who have a clear legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title."

Orton v. Smith, 18 How. 265.
U. S. v. Wilson, 118 U. S. 86.
Frissell v. Gregg, 113 U. S. 550.
Frost v. Spitley, 121 U. S. 552.

Treating this as an action of the same character as its predecessor as found by the court in the last trial, despite the prayer of the complaint and the form of the decree, we will discuss the grounds for reversal here on the merits.

## THE FEDERAL QUESTION.

In view of the decisions of this court and its very recent pronouncement in the case of Ross v. Oregon, 227 U. S. 150, that its jurisdiction cannot be invoked under the provision of section X of Article I, forbidding the passage of any law impairing the obligation of contracts, to correct a judgment that may have that effect—for the reason that that provision is directed against legislative and not judicial acts—we hesitate to urge here our first constitutional ground pleaded in the answer, and set out in the assignments of error.

We can, however, insist on the full faith and credit clause, the deprivation of property without due process and the denial of equal protection of the laws—(Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278), laying special stress on the first, though some of the cases we cite lay it upon the others, for a judgment is property in the highest sense, and its owner is entitled to the protection and enjoyment of rights vested in it and appurtenant to it, and especially to the valuable old maxim, *"Nemo bis vexari eadem causa."*

"A decree of federal court is as much within the full faith and credit clause as a decree of a court of another state."

Bank v. Stevens, 169 U. S. 432.
Livestock Co. v. Landing Co., 120 U. S. 141.
Plumb v. Crane, 123 U. S. 560.
Embry v. Palmer, 107 U. S. 3.
Ins. Co. v. Murphy, 111 U. S. 738.

## SPECIFICATIONS OF ERROR RE-STATED.

These can be put in more compact form for the purpose of our argument. All our assignments rested upon the claim of rights, titles, privileges and immuni-

ties, growing out of and based upon the federal court proceedings merging in the decree of February 22, 1896, and the error committed by the highest court in South Dakota in affirming the judgment and decree of the trial court against the claim made on behalf of Swift. We urge that in so doing the court decided against the force, effect and validity of the federal court decree, and asserted the validity of its own and the trial court's authority in so deciding and that constituted a denial of the rights, titles, etc., claimed by Swift under the constitutional provisions named, in that (a) it impaired the obligation of said decree as a contract, (b) denied it full faith and credit, (c) destroyed its value as property, and (d) denied Swift the equal protection of the laws. The particular pleas in defense thus denied, and which were based upon these judicial proceedings, were estoppel by conduct, *retraxit* and *res adjudicata*. With this preface our specifications may be restated as follows:

I. The state court erred in the respects stated, *as indicated in its opinion* filed March 29, 1911, in support of its judgment (Trans of Record, pp. 58-62). Our assignments relied upon extracts from the opinion statements either denying or ignoring the existence of a federal question (Nos. 2 to 21 inclusive), and especially statements overruling the plea of estoppel by conduct (Nos. 3, 9 and 10); of *retraxit* (Nos. 8 and 17); and of *res adjudicata* (Nos. 5, 7, 11 to 18 inclusive); and generally deciding against Swift's claim of rights under the Constitution (Nos. 17 to 21 incl.).

II. The state court erred in affirming the trial court's judgment, and thereby *approving its findings of fact in conflict with No.* 13 (setting out the federal court proceedings and decree), for that these findings

constituted a denial of Swift's rights, etc., and undertake to adopt as facts matters which were concluded by the decree of February 22, 1896. We object specifically to such findings in conflict with No. 13, in assignments Nos. 22 to 35 inclusive.

III. The state court erred in affirming the trial court's judgment *and thereby approving its conclusions of law* (Trans., p. 85). There were only three of these —(1) awarding a money judgment, (2) decreeing plaintiff the owner of a half interest, and (3) perpetually enjoining Swift, etc. Assignments Nos. 36 to 39 inclusive declare these conclusions unsupported by the findings, treating No. 13 as controlling, and the conclusions therefore a denial of Swift's claimed constitutional rights.

IV. The state court erred in affirming the trial court's decision *rejecting Swift's offered conclusions of law*, which presented the federal question, and specific declarations in support of it, and of the pleas of estoppel by conduct, *retraxit* and *res adjudicata*. Assignments Nos. 40 to 53 (pp. 85-87).

V. The state court erred in its judgment affirming the trial court's decree for that thereby it *approved the trial court's decision generally*, in awarding a judgment for money and entering a decree to quiet title for that this was a denial of Swift's constitutional rights. Assignments Nos. 54 to 60 incl.

VI. The court erred in its judgment of March 29, 1911, for that in express terms and necessary effect it decided the federal question, and his claims under the Constitution, against Swift, without a basis of any independent ground to sustain such a judgment, and where it was not possible to render a judgment against Swift

without passing on the federal question and deciding it against him.

Instead of following these specifications in their order, however, we beg the court's indulgence to follow the course of the "federal question" as presented in the court's finding No. 13, and draw what seems to us the only possible conclusion, that the proceedings and decree were an absolute finality, and should have been so construed by the state court when pleaded by Swift in bar.

## POINTS DISCUSSED.

Our points to be urged for the finality of the federal decree of February 22, 1896, and of the proceedings upon which it is based, will then naturally present themselves in the following order: (1) The court's probable view of the inexcusable delay. (2) The defendant's application for relief and order to show cause. (3) The plaintiff's return and *retraxit*. (4) His attorney's motion to dismiss, without reserving a right to begin again. (5) The order made thereon, and words added thereto. (6) Plaintiff's election of remedies—estoppel by conduct. (7) The bill of complaint considered in the light of its insufficiencies and as subject to demurrer. (8) The contract construed. (9) The verified answer and affirmative defenses. (10) The federal decree final. (11) The state decision wrong.

### 1. *The Inexcusable Delay.*

The case had been begun May 20, 1893, removed to federal court and there an amended bill filed August 11, 1893, a demurrer September 2, 1893, not brought on for argument until May 10, 1894, and when overruled Swift's answer filed July 13, 1894, and a replication August 6, 1894. This Court will take judicial notice

of the fact that it was provided by act of congress that two terms of court should be held each year at Deadwood, South Dakota—one in February, one in September. So two terms passed; no testimony was taken within the three months after August 6, 1894, nor was the time for taking under Rule 69 enlarged; and on September 26, 1895, plaintiff being in default since November 6, 1894, and having no standing in court, or right to ask indulgence from a court of equity, defendant moved in the matter. He had the right to move for dismissal or to "set down the cause to be heard *ad requisionem defendentis* * * *. The declared policy of the United States equity rules and of the federal statutes is to speed the hearing of all causes upon their merits."

2 Bates Fed. Eq. Proc., sec. 678.

2. *Swift's Acceptance of Tender.*

Swift had another privilege. He could accept McPherson's offer and tender of $9,250 half the purchase price (Addl. Trans., pp. 9-20) and half the taxes and other expenditures and consent to an accounting and decree in plaintiff's favor upon these conditions. This he did by a petition verified by his attorney, asking leave at the same time to withdraw his allegations of fraud and deceit. Upon this an order to show cause was granted; hearing postponed—presumptively on the motion of plaintiff, for he made no return.

This offer was before the court for six months. It was not, as counsel contended in a brief below, a record where both plaintiff and defendant conceded the validity of the contract in question, but an effort to close litigation and get a buyer for a half interest in his property. Even if the application verified by defendant's at-

torney were an admission of anything (which it distinctively is not), can it be seriously contended that an offer of compromise, rejected by the plaintiff and disallowed by the court, is to be considered as competent evidence of an admission, and that, too, when verified by the attorney only? (Corbett v. Clough, 8 S. D. 176.) McPherson's affidavit is very different; it was personal; it was deliberate abandonment; it won; it was evidence; it is now a part of the estoppel.

Counsel were in error also in saying below that "on motion for leave to amend his answer the defendant himself had conceded the validity of plaintiff's claim." Defendant conceded nothing. He asked leave to withdraw two affirmative allegations in the answer, and to accept plaintiff as a partner on his tender of $9,250 and more if needed, and on such terms as the court might find equitable and just. It is elementary that offers of compromise are encouraged by the courts, and when not accepted are never to be construed as admissions to the prejudice of the party making them.

Ins. Co. v. Warehouse Co., 93 U. S. 527.
West v. Smith, 101 U. S. 263.
1 Am. and Eng. Enc. of Law, 714-15.

This acceptance by Swift rather constituted a contract by the then law of the state:

"Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal." Compiled Laws 1887, § 3519.

"A proposal is revoked: (1) By the communication of notice of revocation by the proposer to the other party in the manner prescribed by sections 3516 and 3518, *before his acceptance has been communicated to the former.*" Ibid, §3522.

It is not pretended here that any revocation was ever made or communicated to Swift, until the return to the order to show cause filed February 22, 1896—six months after his acceptance served with the order to show cause (Addl. Trans., pp. 27-9).

We contend, therefore, that Swift's acceptance constituted a contract, and that it was too late for McPherson to withdraw. His was a continuing offer, made in his bill of complaint, without limit as to time of acceptance, and defendant, though refusing the tender when made, was at liberty to reconsider at any time before trial, so long as that offer remained open in plaintiff's bill. Acceptance at any time before notice of withdrawal constitutes a contract, binding on both parties.

Ryan v. U. S., 136 U. S. 68.
Patrick v. Bowman, 149 U. S. 411.
Paine v. Loeb, 96 Fed. 168.
Ins. Co. v. Johnson, 105 Fed. 286, 291.
B. & M. R. Co. v. Bartlett, 3 Cush. 224.

It must be noticed that the allegations of inexcusable delay and of overtures and offers of settlement contained in this application of Swift are not denied in McPherson's return.

3. *The Return and Retraxit.*

This was verified by McPherson February 19, 1896, filed by McPherson himself on February 22, 1896, as recited in the court's finding (Addl. Trans., p. 27), as distinguished from the motion filed the same day by his solicitors (Ibid. p. 29).

This return was a clear case of voluntary abandonment and renunciation. It was in writing, under oath, and made after nearly six months' deliberate and careful consideration of Swift's offer served with the order

to show cause. It was filed by him personally (p. 27) when he went over with his attorney (p. 41); and in this he clearly and unreservedly stated that he wanted to quit; that he had no cause of action then and didn't know he ever would. He said in substance (pp. 27-29): "I want my bill of complaint dismissed for these reasons; I long ago withdrew the offer and tender of purchase price ($9,250) for this property; when that offer was made the property was of some value and could have been sold at a profit; it has now depreciated in value, and is not worth nearly the amount I was willing to pay for it. Furthermore defendant's account for expenditures is so unreasonable I don't want to be a co-owner with him in the property. I don't believe I was obliged to pay any part of the purchase money anyhow, but that it can be paid at my option out of sales. I will now wait to see if Swift can get his money out—until then I will bring no suit, and can't say I will then."

Says Blackstone (3 Com. 296): "A *retraxit* differs from a nonsuit in this, one is negative and the other positive. The nonsuit is a mere default or neglect of the plaintiff, and therefore he is allowed to begin the suit again upon payment of costs; but a *retraxit* is an open, voluntary renunciation of his claim in court, and by this he forever loses his action."

And Freeman (I Judgments, 4th Ed., sec. 262): "A *retraxit* has always been deemed a judgment on the merits against the plaintiff, estopping him from subsequently maintaining an action for the cause renounced by his *retraxit*."

And Black (2 Judgments, sec. 700): "It is well settled, therefore, that a *retraxit* is a present and perpetual release of all right of action for the subject matter of the suit, and a judgment upon it estops the re-

tractor from ever afterwards contesting the same matter. It is the admission by the plaintiff, on the record, that he has no cause of action, which constitutes the bar and operates as an estoppel."

The federal courts recognize the *retrasit*. In an early case it was treated as an established practice. A plaintiff had entered a *nolle prosequi* as to one of several defendants whose liability was regarded as joint and several. It was said of the effect of this according to court decisions: "In some cases it was considered in the nature of a *retrasit*, operating as a full release and discharge of the action and of course a bar to any future suit. In other cases it was held not to amount to a *retrasit*, but simply to an agreement not to proceed further in that suit as to the particular person or cause of action, to which it was applied." And so Justice Story, writing the opinion for the court, concluded a *nolle prosequi* in that case as to one defendant was not a *retrasit* as to all; but Justice Johnson dissented in a very learned opinion, holding the dismissal as to one was a dismissal as to all.

Minor v. Bank, 1 Peters 46, at 74 and 80.

Counsel insisted below that the *retrasit* was obsolete. We find no state so holding but Minnesota, and an intimation in the South Dakota court's first opinion reiterated in its last (Trans. of Record p. 60). But we find it to have been frequently applied not only in the states following the practice at common law but also in those which have adopted a code. See the following:

Evans v. McMahan, 1 Ala. 45.
Thomason v. Odum, 31 Ala. 108.
Railway Co. v. Long, 26 W. Va. 692.
Wohlford v. Compton, 79 Va. 333, 337.
Barnard v. Doggett, 68 Ind. 305.

Merritt v. Campbell, 47 Cal. 542.
Cunningham v. Schley, 68 Ga. 105.
Harris v. Preston, 10 Ark. 201.
Hallack v. Loft, 19 Colo. 74, 81.
Waldron v. Angleman (N. J.), 58 Atl. 568.
O'Brien & Cockcroft, Enc. Forms 531-4.
24 Am. and Eng. Enc. of Law, 877.
18 Enc. of Pl. and Pr. 898.

And it will be noticed that it is not required that plaintiff come physically into court (though he so came here)—he may appear just as well by a writing executed by him. In one case this was unacknowledged and unsworn, but held binding (10 Ark. 201). In another the attorney's stipulation in writing was held binding (47 Cal. 542); but in Colorado this was denied (19 Colo. 74). But a judgment in the nature of a *retrasit* if entered upon the personal consent of the plaintiff, was recognized as a bar at common law, and in the absence of statute such is the rule in this country.

In the interesting case cited *supra* from New Jersey (58 Atl. 568) the plaintiff had executed the *retrasit* in writing and filed it with the clerk, but was allowed to show it had been secured from him when drunk. But the court recognizes the rule of the common law as in force there, simply declaring that "under the present practice, the court should carefully scrutinize the circumstances surrounding the execution of such a document when its validity is challenged."

Counsel also urged below that *retrasit* was a rule or practice "exclusively applied to actions at law," and not known in chancery. No authority is cited for this statement and we find none. We cite one case *supra*, however, that was in chancery, and ignores such a distinction. (68 Ga. 105.) A decree in a suit in equity

had been entered and then upon application of the plaintiffs set aside, when they entered a *retraxit* on the minutes of the court (p. 107), and at the following term a judgment *nunc pro tunc* on this *retraxit* was entered. This was in 1875. In 1879 a new bill was filed, the parties being the same. Defendants pleaded the former adjudication, plaintiffs demurred; the demurrer was sustained below, but this decision reversed on appeal, and the doctrine of *retraxit* approved. This case is much like ours. The plaintiffs had their decree set aside, then entered their *retraxit*, and took a new decree accordingly; here the plaintiff rejected the offer of a decree in his favor and filed a *retraxit* and took a decree against himself. Shall he be heard now to repudiate his solemn renunciation?

Nor does the suggestion of counsel made in State Supreme Court,—that because this decree was entered against the protest and objection of defendant, it does not bind the plaintiff—look very equitable. Are counsel serious? Suppose the decree had been in terms in plaintiff's favor, against defendant's protest, would it not have been binding? Why less so when in plaintiff's favor in effect—in allowing him to let go to his advantage, against the protest of defendant, wanting the plaintiff as a co-owner for *his* advantage? Suppose defendant without appeal or reversal of this decree, had sued plaintiff upon his tender of $9,250 and the offer to accept as an agreement, would not this decree of February 22nd have constituted a good plea in bar? Is it possible that plaintiff can come into a court of equity and say that the decree of dismissal which he secured upon his showing, to his advantage, and to defendant's manifest disadvantage, is not a bar to his trying again, because he got it over defendant's protest? Not by the maxims

of equity (11 Am. and Enc. of Law, 156 to 189; So. Dak. Comp. Laws, secs. 4696 to 4730).

It is held that a judgment of dismissal entered in pursuance of an agreement of the parties is in the nature of a *retrasit* and a bar, quoting Blackstone's definition.

U. S. v. Parker, 120 U. S. 89, 95.

Some states allowed by statute one retrial in an ejectment case, as a matter of right. The courts hold that a discontinuance, after order for a new trial in such a case, is a bar to a new action.

Fraser v. Miller, 9 Fed. Cases, No. 5064.
Cunningham v. Milwaukee, 13 Wis. 133.
Hyatt v. Challiss, 55 Fed. 267.
Same v. Same, 53 Pac. 467.

A dismissal of an action by agreement, without reservation of the right to sue again, is treated as equivalent in its effect to a *retrasit*.

1 Freeman on Judgments, 4th Ed. 478.
Crossman v. Davis, 79 Cal. 603.
Philpott v. Blaisdell, 10 Nev. 19.
Plummer v. Dougall, 14 Iowa 69.
Ford v. Roberts, 14 Colo. 291.

Here we took no appeal—it is doubtful if defendant could have appealed,—this constituted an acquiescence in or consent to the dismissal though granted against defendant's protest. The act of plaintiff was a deliberate abandonment of a then cause of action. The court never intended to allow him to withdraw a formal offer made in his pleading, on its files, after unqualified acceptance in writing by Swift, and when Swift would be benefited by acceptance, and injured by McPherson's withdrawal,—unless upon the theory that plaintiff was withdrawing for all time. It was upon this theory, most

explicitly, that the federal judge directed plaintiff's attorney to add the words to the order of dismissal,—wholly unnecessary otherwise—*"Let decree be entered accordingly."* (Considered *infra.*)

*Furthermore,* plaintiff's verified request to dismiss his bill of complaint is unqualified, and contains no request that it be made without prejudice, or with leave to begin again, or to bring an action at law, or anything of that kind. His personal construction of the contract, that it "does not require this affiant to pay any part of the purchase money for said property *but the same is to be paid at affiant's option out of the proceeds of the sales thereof,"* (Addl. Trans., p. 29) is a construction of the contract under counsel's advice, not an expression of an intent to reserve the right to bring a new action. If it was an *option* merely, how enforceable at all under his own state statutes ~~cited~~ infra p.p 81-2

Still further, a court of equity would not allow him to take a dismissal to Swift's injury. Here, the order to show cause was based upon the "verified petition of defendant and all the pleadings and papers on file in this case." It cannot be presumed the court was contemplating that plaintiff might play hot and cold with it—dismiss when property had depreciated in value, to revive or begin again if an appreciation set in.

The South Dakota court has itself twice decided that a plaintiff "ought not to be allowed to dismiss his action unconditionally—even in the absence of a counter claim—where to so discontinue would manifestly work a serious wrong to defendant."

Axiom Min. Co. v. Little, 6 S. D. 438.
Axiom Min. Co. v. White, Ibid 610.

In a case in this court it was held that leave to discontinue a suit in equity to restrain bringing suits

for rent, alleging an election to terminate the lease by virtue of its provisions, and that the lease was *ultra vires*, and offering to do what was equitable and right for the property demised, and asking the court to decree the compensation or relief to be made,—was properly denied, after the lease had been held void in another case, and after an injunction had been granted against recovering rent, and testimony had been taken on the issues involved in the suit, when defendant opposes such discontinuance and asks leave to file a cross bill to avail itself of the tenders made in the original bill.

P. P. C. Co. v. Trans. Co., 171 U. S. 138.

Where a defendant has expended time and effort in gathering testimony, plaintiff shall not be allowed to dismiss except upon condition that the testimony be perpetuated. Not to affix a condition would operate to deprive defendant of a "substantial right which had accrued since the suit was brought."

Am. etc. Co. v. Moyer, etc. Co., 123 Fed. 204.

Plaintiff is not entitled as of right to dismiss his bill after answer is filed setting up that the license to use a patent upon which the suit is brought is fraudulent and void and defendant entitled to a decree for its cancellation.

Mfg. Co. v. Waring, 46 Fed. 87.

Nor where a cross-bill has been filed to obtain rights otherwise necessary to seek by an independent action.

P. P. C. Co. v. Cent. Trans. Co., 49 Fed. 261.

Nor after an interlocutory decree practically deciding the case on demurrer and exceptions to the pleadings.

Hershberger v. Blewett, 55 Fed. 170.

The plaintiff cannot dismiss where a new action would bar defendant's relief.

Callahan v. Hicks, 90 Fed. 539, 543.

If nothing has been done for two years after case has been at issue plaintiff will not be allowed to dismiss.

Light Co. v. Mahler, 88 Fed. 427.

The plaintiff will not be allowed to dismiss if in the light of the proceedings the defendant is reasonably entitled to a decree.

C. A. R. Co. v. Rolling Mill Co., 109 U. S. 713, 716.

A bill will not be dismissed "without prejudice" when the plaintiff has had ample opportunity to obtain his testimony and prepare his case on the merits.

Rumbly v. Stainton, 24 Ala. 712.

After a voluntary dismissal of a bill by the plaintiff he will not be allowed to reinstate it.

Orphan Society v. McCartee, 1 Hopk. Ch. 372.

It is within the discretion of the court to refuse to permit a plaintiff to dismiss his bill if the dismissal would work a prejudice to other parties, as where one defendant had established his claim against a co-defendant.

Bank v. Rose, 1 Rich. Eq. 292.

After an order to account, and report made, the plaintiff cannot dismiss on payment of costs.

Bethia v. McKay, Cheves Ch. Cas. 93.
Hall v. McPherson, 3 Bland. 529.

A voluntary dismissal will not be reinstated, unless there is fraud or mistake.

Willard v. Wood, 164 U. S. 521.

Where there has been any proceeding in the cause which has given the defendant a right against the plaintiff, the plaintiff cannot dismiss his bill as of course; thus, where a general demurrer had been overruled, on argument Lord Cottenham was of opinion that the plaintiff could not dismiss his bill as of course, the defendant having a right to appeal against the order overruling the demurrer,—which right he ought not to be deprived of on an *ex parte* application.

1 Daniell's Ch. Pl. & Pr., 6 Am. Ed. 791.*

The federal court should, in view of the foregoing authorities, have denied the application to dismiss as coming too late and granted defendant's application as constituting a contract. But as it did not, its action must be construed as a finality, a dismissal on the merits.

4. *Attorneys' Motion to Dismiss.*

This was filed by plaintiff's solicitors February 22, 1896, the same day their client personally filed his return to the order to show cause. It, too, is without reservation (Addl. Trans., p. 29): "Now comes the said complainant by * * * his solicitors and moves this honorable court to dismiss the bill of complaint heretofore filed herein in the above entitled cause" (dated February 18, 1896).

The usual form where it is desired to preserve the right to begin again is:

"Your petitioner, having exhibited his bill in this honorable court on the .... day of ....., A. D. 19.., against C. D., the defendant, is, since the filing of the same, advised to proceed no further; wherefore he prays that the bill may stand dismissed without prejudice."

Simkins Fed. Eq. Suits, p. 351.

The intent of McPherson's solicitors clearly was to dismiss for all time. We cannot assume that they omitted the words "without prejudice" deliberately, to contend later (*if the property appreciated in value*) they were to be considered as in the motion. The response of the attorney to the judge later (*infra*), was an afterthought.

This motion does not seem to have been served—although this is the proper practice, for dismissal after answer is never granted without notice—but this point was not made on the hearing.

The argument against McPherson's request to dismiss, *supra*, applies to this motion. The court's view of it was announced when the order based upon it was presented.

5. *Order of Dismissal.*

In a foot note to Daniell's Chancery occurs the following: "The order for dismissing a bill at the hearing is not usually termed in the books 'a decree' but merely an 'order of dismission;' but to prevent confusion it is thought best to designate it 'a decree,' to distinguish it from 'an order to dismiss' made upon motion."

2 Daniell Ch. Pl. & Pr., 994*.

Possibly the attorney for plaintiff may have had that practice in mind, when he presented the order in the following form: "Upon reading and filing the foregoing motion * * * it is by the court considered and ordered that said motion be and it is hereby granted, and the complainant's bill of complaint is dismissed at complainant's costs." (Addl. Trans., p. 29.)

But the judge, according to the uncontradicted testimony, directed the attorney for complainant to add the words, *"Let decree be entered accordingly."* And he

added them at once to the order, in his own handwriting, before it was signed by the judge. (Trans., p. 92, and Addl. Trans., p. 42, p. 44.)

This indicates beyond question the court's intention that this should be a final determination of the case. There can be no other possible explanation, and plaintiff below did not attempt any. Why were the words ordered in unless a final decree was to be entered, and not a mere "order of dismission?"

Suppose the parol testimony be held inadmissible, then the order would be treated as the deliberate act of the court, and the same meaning be given it precisely, with the added presumption that attorney for plaintiff either prepared it in the first instance in that form or assented to it if prepared by the court.

### 6. *Estoppel by Conduct.*

Our 12th conclusion offered in the trial court and there rejected (Trans. of Record, p. 41), correctly states the law: "The acts and declarations of the plaintiff in procuring the decree of February 22, 1896, in the former suit, estop him from maintaining this action for the same relief he sought in that, and which he there asked and induced the court to deny." This was based on the thirteenth finding of fact adopted by the court setting out the pleadings with McPherson's verified return to the order to show cause. The Supreme Court approved the rejection of our offered conclusion, and thereby denied us the benefit of it and of our plea of the same matter in our answer. McPherson's repudiation of Swift's acceptance, and the withdrawal of his tender offered to be brought into court, with consent to decree against him, when he might have had a decree in his favor, on the terms of his bill, presented a clear case of estoppel by

conduct—in this case election of remedies. The three reasons given—(1) He did not want the property at the price tendered or at any price now that it had depreciated in value, (2) he did not want the partner in any event, and (3) he had an option under the contract to wait for sales to reimburse Swift—should bar him from saying later, "now, as I think you have got your money back, I change my mind, and will exercise my option. I now want the property, and will endure the partner; you shall not make a profit unless I share it, though you might have made a loss without contribution from me."

The South Dakota statute in force then and since, takes a different view of the subject: "One must not change his purpose to the injury of another." (Comp. Laws, So. Dak., § 4699.)

And a decision of that state conforms to our view:

"When one who has the choice of two remedies elects to take one, with a full knowledge of all the facts, he is estopped from afterwards claiming the benefit of the other as to the same property."

Humpfner v. Osborne, 2 S. D. 310.

"Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

Davis v. Wakelee, 156 U. S. 680, 689.

"Defendant cannot be heard to say, that what was asserted on a former trial was false, even if the assertion was made by mistake; if it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it."

R. R. Co. v. Howard, 13 How. 307, 337.

"Where a party gives a reason for his conduct and decision, touching anything involved in the controversy, he cannot after the litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold."

R. R. Co. v. McCarthy, 96 U. S. 258, 267.

"Any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies."

Robb v. Vos, 155 U. S. 13, 43.

"An adjudication upon a matter alleged in a proceeding or pleading, in a court of record, it would seem, is not necessary to create an estoppel against a contrary or inconsistent assertion in any subsequent suit with the same adversary, or his privies in estate or in law. 'Any confession or admission made in a pleading, in a court of record, whether it be express, or implied from pleading over without a traverse, will forever preclude the party from afterwards contesting the same fact in any subsequent suit with his adversary.'"

Sullivan v. Colby, 71 Fed. 460, 464.

"A man who obtains or defeats a judgment by pleading or representing an act in one aspect will be precluded from giving it a different and inconsistent character in a subsequent suit upon the same subject."

McQueen's Appeal, 104 Pa. St. 595.

"The defense of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance and the other upon a disaffirmance of a voidable contract or sale of property. In such cases, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties once for all."

Connihan v. Thompson, 111 Mass. 270, 272.

"One who has taken a writ of error from a judgment to a higher court, cannot while that proceeding is

pending, plead said judgment in bar of an action against himself by the plaintiff therein."

Hughes v. Mfg. Co., 28 Fed. 40.

See also the following cases in point:

Michelis v. Olmsted, 157 U. S. 198, 201.
*In re* The New York, 113 Fed. 810.
Savings, etc., Co. v. Irr. Co., 112 Fed. 693.
Moore v. Beisiker, 147 Fed. 367.
Ins. Co. v. Burman, 141 Fed. 835.
Long v. Lackman, 135 Fed. 197.

*7. The Bill of Complaint.*

This was one of the essential matters considered by the court in making its final decree, and it is so recited. There are at least four phases of that bill subject to demurrer: (a) the contract, (b) the tender of $9,250 and offer to bring into court, (c) the allegations in paragraphs 8 and 10 of Swift's repudiation of the contract upon Miller's death, and continuous adverse possession since, (d) the offer of administrator to act as agent.

(a) The contract will be considered separately in the next subdivision of our argument. But in answer to counsel's possible suggestion that an earlier judge overruled a general demurrer to this bill and that his order became "the law of the case," we beg to say: The Supreme Court of South Dakota has held otherwise in a case where a demurrer had been sustained,—opinion by one of the attorneys in this case then territorial judge. Referring to the ruling of the earlier judge on the demurrer he said: "No doubt the sustaining of the demurrer was an expression of the then presiding judge's views regarding the contract; * * * *but is there any rule of practice or principle of law, which would preclude his changing his views, upon further reflection*

*and examination,* and admitting it in evidence as the contract of the Keets Mining Company? I apprehend not, and if not, certainly *the succeeding judge of this court was not barred from exercising his own judgment as to the effect to be given to the instrument offered.*"

Pearson v. Post, 2 Dak. Ter. 220.

On appeal to this court this judgment was affirmed, and the law as above declared was expressly approved.

Post v. Pearson, 108 U. S. 418.

That Judge A. D. Thomas may have taken a different view of the contract in question, as the main feature of the bill, is a very strong inference to be drawn from his decree dismissing plaintiff's suit and bill of complaint, February 22, 1896.

(b) The court must also have taken into consideration the tender of $9,250 and an additional sum to cover costs, etc., as a construction of the contract so inconsistent with McPherson's *retraxit* and withdrawal as to leave the complaint without equity. While this would not be a ground of demurrer to the bill in the first instance, it was a very distinct ground of objection to it as proposed to be amended and dismissed.

(c) The acts and conduct of Swift, on and after Miller's death, January 12, 1891, are set out at length in paragraphs 8 and 10 of the bill (Addl. Trans. of Record, p. 8, p. 10-11), both as an executor in refusing to inventory these contracts, and as an individual in rejecting the theory of a vested interest in the Miller estate, and maintaining an exclusive and continuous adverse possession and so positively alleged that the case comes squarely within the law as laid down by this court in Seymour v. Freer, 8 Wall. 202 (*infra*), construing a similar contract. The plaintiff effectually stated

himself out of court by these allegations. The judge presiding must have so regarded the bill.

(d) The administrator evidently intended to bring himself within the terms of that decision by his written offer to serve as agent for Swift. But the rejection of the offer,—whereas in the Seymour-Freer case it was accepted, and continued for a term of years—so clearly distinguished our case from the other as to constitute the repudiation there referred to, and state the plaintiff out of court.

There are many other elements in this bill that render it subject to a general demurrer, and that was clearly the view of the trial judge in signing and entering the decree of February 22, 1896.

8. *The Contract Construed.*

As the action was based upon the contract of May 14, 1888, this was necessarily construed by the court in rendering its decree, and construed in favor of Swift and his contention, that it was a mere contract of employment terminated by Miller's death.

The only basis for a contrary contention is the language of the preamble: "Whereas, the said party of the second part (Miller) has purchased for the said party of the first part (Swift) and for joint account, the property situated * * * excepting certain portions not * * * deeded to said Swift, as shown from his deed from Vehmeyer on record at register of deeds' office."

It will be noticed that neither in this preamble nor in the agreeing part which follows, is there an intimation of any antecedent or concurrent consideration. Miller, as an alleged "purchaser" for Swift did not pay any part of the purchase price nor incur any expense, nor

perform any service—as in the cases of Seymour v. Freer, 8 Wall. 202, and Hyman v. Peters, 30 Ill. App. 134, relied on by counsel for defendant in error. The contract throughout repeatedly recognizes Swift to have paid the whole of the purchase price, to hold the legal title and sole power of disposition, and to be entitled to reimbursement for his investment with interest computed monthly if an income received, otherwise semi-annually if no income (Addl. Trans., pp. 7-8, and *ante*). Everything in the instrument was executory, a list of mere contingent promises. The very first agreement was in consideration of Miller looking after the property, collecting rents, attending to repairs, paying taxes, etc., *he shall receive for his services* one-half of all the net profits after deducting 8 per cent interest on the $18,500. He was to remit Swift monthly his interest and half of the profits, and in consideration of Miller's agreeing to pay half of any ultimate loss on said purchase price (how if unable?), Swift agrees he shall receive one-half of the profits ultimately accruing from sale (how if none?) above said purchase price of $18,500. Miller agrees in case of no income to remit at least once each six months 8 per cent interest on one-half the purchase price. Each party pays when due one-half of taxes, insurance, repairs, etc. All money realized from sales to be remitted to Swift and credited on the $18,500. Additional investments for improvements subject to same conditions. Evidently to be paid by Swift and added to investment as shown in his account stated in the answer (Addl. Trans., pp. 18-19); and admitted in account plaintiff now states (Trans. of Record, p. 48).

It will be noticed that Miller was not given a power of attorney nor any authority whatever to make deeds or contract for sales; no time limit fixed as in the Sey-

mour-Freer case; and no right given Miller to purchase a half interest—construed as an "option" by McPherson in bill of complaint and also in his affidavit in federal court (Addl. Trans., p. 29). Can it be said that any right vested in Miller under this agreement, or in his administrator as alleged in the complaint in this action (Trans. of Record, p. 2) and in the bill in federal court (Addl. Trans., p. 8) or in McPherson as assignee or grantee as also alleged? The state court held there was such an interest (First Trans., p. 61). That court further held that "the contract created a partnership or joint venture, which was in essence and effect a partnership transaction." (Ibid, p. 64, first opinion approved by the later.) But this was denied of the Seymour-Price contract in the case in this court.

The case of Seymour v. Freer, 8 Wall. 202 (where the court divided four to three), is much relied on by counsel for McPherson; but as we view it the case is at once distinguishable from the case at bar. The majority opinion was filed by Justice Swayne; the minority by Justice Field. The contract was between Henry Seymour of New York and Jeremiah Price of Indiana, and related to lands in Illinois. The action was between Freer as administrator of Price's estate and Horatio Seymour *et al.*, heirs of the other contracting party. As the case is an important one to be considered in this controversy, and contains so much that sustains our contention here we beg to refer to it at some length. The contract in that case gave Price a roving commission at his own expense, to devote his time and attention and exercise his best judgment, in purchasing lands to an amount not exceeding $5,000, in the States of Indiana, Illinois and Ohio, and the territories of Michigan and Wisconsin, conveyances to be taken in Seymour's name, and he to

furnish the $5,000.00. Lands were to be sold in five years (no limit here), and after charging the investment, the taxes, and 7 per cent interest on the $5,000, Price should have one-half of the profits in full for his services and expenses in making explorations, searches and purchases. Some 2,400 acres and some town lots in Joliet, were bought, title taken in Seymour's name, and apparently nothing further done until after the death of both parties. The contract was made May, 1835; Seymour died in 1837; Price in 1854. At the end of the five years (1840) the lands were unsalable, and it was doubtful if they would have sold for enough to pay the investment and interest. But the devisees of Seymour voluntarily continued Price as agent, and after December 24, 1841, he received the moneys from sales and remitted them to Seymour's devisees until the principal and interest were more than returned. This suit was by a representative of Price's estate for an accounting and sale of the balance of the lands. The court below held it a case of partnership, and gave the relief asked. The court above denied the partnership theory, and treated it as a case of equitable conversion: "Equity considers that as done which is agreed to be done." But here is the test of this case (independent of its wide difference from ours, in limit of time for sale, the death of the principal, Seymour and the employment of Price, and later of the administrator of Price's estate as agent by the devisees of Seymour). We quote from the opinion of the majority: "At the end of the five years, limited for its complete fulfillment a new element * * * intervened. The property if then sold, would have afforded no profit. * * * Either Price or Seymour's devisees might have insisted upon the sale of the property according to the contract. This would have ex-

tinguished the rights of both parties, touching the lands, but it would have benefited neither. * * * *The devisees might have held the property and denied that, under the circumstances, the trust subsisted any longer. If Price acquiesced, his rights would have been at an end. Price might also have expressly or tacitly abandoned his claim. This would have worked the same result.* Both parties might have concluded to continue their existing relations. * * * Was either of the alternatives adopted? And if so, which one? *This is the turning point of the case.* The burden of proof as to the two former rests upon the appellants. Upon a careful examination of the record we have failed to find the slightest proof of any disclaimer by the devisees, or of any renunciation by Price." How different the case here, where, according to the bill of complaint in the federal court, Swift at once upon the death of Miller denied that any interest belonged to his estate and assumed exclusive adverse possession. Further, within the terms of the Seymour-Freer case, McPherson by his *retraxit* in federal court and consent to a decree of dismissal there "abandoned his claim." The minority opinion, pronounced by Justice Field, declared that Price had no interest in the land and therefore there could be no pretense that the land was subject to a trust for his benefit.

Another case, relied on by counsel—Hyman v. Peters, 30 Ill. App. 134—will be found also widely different in its facts. The contract recited that Hyman had purchased the property for the joint account of himself and Robinson, for the sum of $15,000, of which $6,000 was cash down and the residue in two equal installments of $4,500 each, secured by deed of trust in which, as well as in the notes, it was recited that Hyman

should have the privilege of paying each before maturity. Robinson advanced $6,000 to Hyman for the cash payment, and took title to the lands subject to the deferred payments which he agreed to make if necessary, and to pay taxes. Hyman was to sell the premises within one year, unless otherwise agreed, and to make no charge for buying, selling or attending to payment of taxes. Upon the sale of the premises, Robinson was to be reimbursed for his advances with interest at 7% and the balance of the proceeds was to be divided equally. Hyman added his personal covenant, that upon a sale Robinson should be reimbursed in any event the full amount of all advances made and to be made, with 7% interest. Shortly after the year expired, Robinson died, having devised these premises to trustees. *Two years later the trustees entered into an agreement with Hyman, continuing the former contract and recognising Hyman's rights to half the profits.* Thereafter they paid expenses. Hyman became indebted to a bank in the sum of $100,000, and by agreements with these trustees, his interest in the profits on these lands was pledged to this bank as security. Hyman died, and later the receiver of the bank, Peters, brought this suit against Robinson's trustees and Hyman's administrator to compel a sale of the land and an accounting. The court granted the relief prayed for. The case is so easily distinguished from ours, we are surprised it should be used to support McPherson's construction of the contract in controversy here. We have given above, the facts on which court's opinion was based, always important to a proper understanding of the decision.

The case of Stow *et al.* v. Robinson, 24 Ill. 532, is in point and the decision of a higher court. There was a written contract between Robinson and Rattray,

which recited that Robinson had purchased a certain block number 43, in Cook county, and in consideration that Rattray should get the block subdivided, as they should mutually think proper, and dispose of the same, either at private or public sale, as soon as practicable and thought proper by the parties, for one-quarter cash and the remainder in deferred payments, bearing interest, Robinson agreed that he would, upon the payment of the one-quarter in cash and delivery of the notes, execute his bond providing for deeds of conveyance, when such notes were paid in full, provided, the sale should not be less than $1,200.00 in the aggregate. It was further stipulated that Robinson was to receive the amount of $965.00 purchase money, together with interest on the same; then the balance to be divided equally between the parties, for which privilege Rattray was to plat, survey or sub-divide the block and advertise and sell the same *at his own expense*. This was a bill by the heirs of Rattray against Robinson, to compel performance of the agreement. The bill alleged, among other things, that Rattray went on and subdivided the block into 72 lots, of which he sold 19 for $977.00, and paid Robinson $866.62 of that amount; that Robinson then stopped the sale of the lots and refused to permit any more to be sold, or to make any more title papers. The court below dismissed the bill on the ground that it was wanting in equity; the Supreme Court affirmed the decree upon grounds that bear closely upon the case at bar. They held the agreement incapable of being executed. It "expressly stipulated for the performance of labor and the exercise of skill by Rattray, and for a compensation therefor by a division of the profits, which might be realized over and above the original cost of the land. *It contained no agreement for any conveyance of any*

*portion of this land, at any time, from Robinson to Rattray or of any interest in it. Until that occurred it was the manifest intention of the parties that Robinson should not part with the title. * * * It is evident from this agreement that it was Rattray's skill and personal service for which Robinson contracted, and were others permitted to render that service in effecting sales, it would be to compel him to receive that for which he made not agreement. * * * A court of equity has the power to execute a contract by compelling the parties to receive what they have contracted for and to perform all they have agreed to do; but has no power to compel a party to receive something else or to do other or different acts than those agreed to be performed. The contract for Rattray's skill and service was not confined to a sale of a specific amount of the property, to refund the purchase money, but it extended to a sale of every portion of the premises, and so long as any portion of the property remains unsold by Rattray, his part of the contract has not been executed; and for the want of a full and complete performance by him, when the remaining portion is incapable of being performed, a specific execution of the contract cannot be decreed. The parties have failed to provide by their contract for the substitution of the heirs or representatives of Rattray in case of his death, to execute his part of the agreement, by rendering their skill and labor. And although theirs might be equal or even superior, as it is not that for which the party contracted, he cannot be required to receive it."*

The fair inference from the Seymour-Freer and Hyman-Peters decisions is that but for the fact that heirs and legal representations expressly revived and continued the agreement, it would have been held not to create a

trust, but to constitute a mere contract of employment, terminable at will; or it would have been construed as in the following federal cases:

Bank v. Mortgage Co., 35 Fed. 22.
Stier v. Ins. Co., 58 Fed. 843.
Signal Co. v. Watch Co., 59 Fed. 20.
Walker v. Walker, 125 U. S. 339.
Machine Co. v. Ewing, 141 U. S. 627.

And the following among many state cases:

Dexter v. McDonald, 196 Mo. 373, 394.
Ellsworth v. Pomeroy, 26 Ind. 158.
Coal Co. v. Mohr, 83 Pa. St. 228.
Walker v. Denison, 86 Ill. 142.
Flanagan v. Brown, 70 Cal. 254.

This was clearly not a partnership within the law as declared by this court: "That rule, however (liability to creditor), has no application whatever to a case of service or special agency, where the employe has no power as a partner in the firm, and no interest in the profits as property; but is simply employed as a servant or special agent, and is to receive a given sum out of the profits or a proportion of the same as a compensation for his services."

Berthold v. Goldsmith, 24 How. 536, 543.
Meehan v. Valentine, 145 U. S. 611, 623.
Schaeffer v. Blair, 149 U. S. 248, 258.
The J. P. Donaldson, 167 U. S. 599.

Nor did this agreement confer on Miller a power coupled with an interest, as the interest must be in the thing itself, and not in that which is produced by the exercise of the power. See Chief Justice Marshall's definition which has been the law ever since his decision.

Hunt v. Rousmanier Adms., 8 Wheat. 174, 203.
State *ex rel.* v. Walker, 125 U. S. 339, 342.

And this was then and since the law of South Dakota. See the following in Compiled Laws of 1887:

§ 4006. "An agency is terminated, as to every person having notice thereof, by: (1) The expiration of its term; (2) the extinction of its subject; (3) the death of the agent; (4) his renunciation of the agency; or (5) the incapacity of the agent to act as such.

§ 4007. Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated as to every person having notice thereof, by (1) Its revocation by the principal; (2) his death; or (3) his incapacity to contract."

§ 3773. "Every employment, in which the power of the employe is not coupled with an interest in its subject, is terminated by notice to him of: (1) The death of the employer; or (2) his legal incapacity to contract. Every employment is terminated: (1) By the expiration of its appointed term; (2) by the extinction of its subject; (3) by the death of the employe; or (4) by his legal incapacity to act as such."

The crucial test of this contract is, could Miller while living have been compelled to remain as Swift's agent and comply with its terms? Could the administrator have been subjected to such a suit? Could McPherson, as alleged assignee, have been compelled to take up and discharge Miller's duties? If not enforcible against them they cannot enforce against Swift.

Again, the statute of South Dakota settles the question. See the following sections in Comp. Laws of 1887:

§ 4628. "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance."

§ 4632. "The following obligations cannot be specifically enforced: (1) An obligation to render personal services; (2) an obligation to employ another in personal service, * * * (6) an agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.

§ 4633. "Specific performance cannot be enforced against a party to a contract in any of the following cases: (1) If he has not received an adequate consideration for the contract; (2) if it is not, as to him, just and reasonable; (3) if his assent was obtained by misrepresentation, concealment, circumvention, or unfair practice of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled."

These last sections become additionally important when considered in connection with the next topic.

9. *The Verified Answer.*

This was before the court as evidence in rendering its decree. We tried to convince the state court of this, but were unable to do so. The amended bill of complaint filed in federal court did not waive verification of the answer. That was a manifest advantage to Swift. The rule in all equity cases is, that when the oath is not waived, then whatever in the verified answer is responsive to complainant's bill is to be taken as evidence for defendant, and the complainant is bound to produce two witnesses or one witness and circumstances corroborating him, to overthrow such answer. And when the answer is confined to such facts as are necessarily required by the bill and those that are inseparably connected with them, forming a part of the same transaction, the answer is responsive.

Hughes v. Blake, 6 Wheat. 453.
Godden v. Kimmel, 99 U. S. 201, 206.

Vigel v. Hopp, 104 U. S. 441.
Beals v. R. R. Co., 133 U. S. 290.
Latta v. Kilbourn, 150 U. S. 524, 542.
Slessinger v. Buckingham, 17 Fed. 454.
Walcott v. Watson, 53 Fed. 429.

States like Illinois, Michigan and other non-code states adhere to the same rule.

Another equity rule is, "If the complainant in his bill shall waive an answer under oath * * * the answer of the defendant, though under oath, * * * shall not be evidence in his favor, *unless the cause be set down for hearing on bill and answer only.*" (Equity Rule, No. 41.) This is what was had here, only the affidavits were also used on the hearing and sworn answer was *not* waived.

The complainant, by his objection to defendant's withdrawal of his affirmative defenses and request to dismiss his bill of complaint, virtually invited a hearing upon bill and answer, and would therefore under Rule 41, have been bound by the answer though verification waived, much more by this verified answer where no waiver. The answer met the allegations of the bill in their order. It put in issue twelve of these allegations, material to the maintenance of plaintiff's action—everything that went to support his claim of title, or his right to recover, (1) the appointment and qualification of administrator (Addl. Trans., p. 15); (2) that he became vested with an interest, etc. (Ibid. p. 15); (3) denied the validity of county court proceedings; (4) the sale; and (5) the deed (Ibid. pp. 16-17); (6) denied the payment of any consideration for the deed (p. 16); (7) denied that Miller performed all or any of the conditions on his part, except collecting some rents and paying

taxes therefrom or from money sent him by Swift (p. 17); (8) denied that he paid interest once in six months except as a small balance of rents over taxes may have constituted a contribution as set out in his account; (9) denied that the title was taken in his name for the joint interest of himself and Miller (p. 17); (10) denied that he had held a half interest in trust for Miller or now so holds a half interest for McPherson (p. 18); (11) denied that receipts had exceeded expenditures, and set out an account showing $29,116.10 balance charged to investment to date (pp. 18-19); (12) denied the "good demand and opportunities to sell" (pp. 19-20); (12) denied the commission or threat of any wrong or the making of any claim without right, etc. (p. 22). Then there are responsive affirmative allegations—notably (a) the devise of property by Miller's will to trustees, and their non-discharge (pp. 20-21); (b) the proceedings of county court without jurisdiction and void (pp. 16-17); (c) the administrator interested in the purchase and sale void (p. 17)); (d) an appeal duly taken from the county court proceedings and still pending, so deed carried no title (p. 17); (e) contract without consideration, one of personal employment, and agency terminated at Miller's death (pp. 22-3); (f) contract secured by misrepresentation, concealment, etc. (pp. 23-4); (g) and other responsive affirmative matters throughout the answer, asserting sole, exclusive, open, notorious, adverse title and possession ever since Miller's death.

On the hearing in federal court this verified answer was evidence for Swift, and the court gave him the benefit of it. The rule in the federal courts is: "When a suit in equity is set down for final hearing on bill and answer, upon that hearing the material allegations of the answer are taken as true in all points, and the allegations

of the bill which are not admitted by the answer are to be taken as untrue."

1 Bates on Fed. Eq. Proc., sec. 327.

Our contention is that the court here set the suit down for hearing on its own motion on bill, answer and affidavits, when it directed attorney for plaintiff to add to the order of dismissal the words, *"Let decree be entered accordingly."*

The 7th finding of the court on this last trial was that Swift duly prosecuted an appeal (Addl. Trans., p. 3). This means he took the proper steps of serving notice, giving bond to stay proceedings, and perfecting appeal within ten days. The law provided (Comp. Laws 1887):

§ 5965. "An appeal by a party, or by a person interested who was present at the hearing, must be taken within ten days."

The law prohibited an administrator from being interested in a sale (Ibid. p. 17):

§ 5859. "No executor or administrator must directly or indirectly purchase any propety of the estate he represents, nor must he be interested in any sale."

§ 5887. "No administrator or executor shall purchase any claim against the estate he represents."

The allegations of want of consideration, misrepresentation, concealment, etc., made the contract non-enforcible (So. Dak. Laws, *ante*).

Clearly, on the verified answer as evidence before the court, with nothing to contradict, and with the admissions and allegations of the complaint and of the McPherson affidavit, the court was justified in entering a final decree. And for the state court to rule it was not final, is to deny him the benefit of his verified answer.

In a case in Massachusetts it was held that a former dismissal upon motion of plaintiff without qualifying words, "without prejudice," or "with leave to bring another suit," was final. And this is one of the reasons given, directly in point here:

"The plaintiff had searched the conscience of the defendant by his bill, and had obtained the discovery which he sought and to which he was entitled (here the account). *The answer on oath was competent evidence in the cause.* The time had passed within which by the rules of court the plaintiff had a right to file a replication and take testimony. *As the suit stood, the defendant was entitled to have it heard upon bill and answer.* (So here.) It would have been highly inequitable to allow the plaintiff without cause shown and without notice to the other party to become non-suit, and so be at liberty to sue again, *when he might waive the oath and deprive the defendant of the benefit of his answer.* But he might well be allowed to enter the decree which was ordered because such a decree was all to which the defendant was in any event entitled. The bill was dismissed without any words of restriction or qualification. It was not dismissed 'without prejudice,' or 'with leave to bring another suit.' This is a judgment which, as was setled in Foote v. Gibbs, 1 Gray 413, *'Is conclusively presumed to be upon the merits, and is a final determination of the controversy.*"

Borrowscale v. Tuttle, 5 Allen 377.

10. *The Federal Decree Final.*

We tried to convince the state court, but failed, that while the effect given a state judgment may be governed by the decisions of the state court—

Bank v. Memphis, 189 U. S. 71—

another rule prevails as to the construction of a proceeding and decree of the federal court. There is no conflict of decision on this point.

"A decree of the federal court must be given the force and effect to which it is entitled under the principles of *res adjudicata* as settled in this court."

Gunter v. R. R. Co., 200 U. S. 273, 290-91.
Bank v. Frankfort, 191 U. S. 499, 516-17.
Embry v. Palmer, 107 U. S. 3.
Cohen v. Virginia, 6 Wheat. 264.
Life Ins. Co. v. Debolt, 16 How. 416.
McCullough v. Virginia, 172 U. S. 102.
Bank v. Skelly, 1 Black 436, 443.
Douglas v. Kentucky, 168 U. S. 488, 500.

We urge that the decree was final (a) as indicated by its recitals and the proceedings on which it was based; (b) as presumed from the absence of qualifying words, and (c) as shown by the parol testimony.

(a) The reasons for the requested dismissal set out in McPherson's affidavit have already been considered in our discussion of the *retraxit, ante*, also, the admission of the showing of delay and non-compliance with the rules set out in the affidavit of Swift's attorney accompanying the offer to settle on terms of plaintiff's *tender; also, the absence of the words "without prejudice"* in the motion to dismiss filed by McPherson's attorneys; and not only the absence of such words in the order of dismissal, as submitted by his attorneys, but the addition thereto by order of court of the words, *"Let decree be entered accordingly."* Premising that the decree was based on these proceedings and also on the bill and verified answer, it remains to consider the recitals of the decree itself.

Of course, the recitals in the decree of February 22, 1896, were unnecessary; the short form prescribed by Rule 86 is: "This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:" But the recitals are useful here as conclusively showing what evidence was used upon the hearing (to-wit, the affidavits and the pleadings), and such recitals are sanctioned.

Putnam v. Day, 22 Wall. 60, 67.

This is the old English chancery practice, unless changed by the Judicature Acts: "Decrees in general consist of four parts: (1) The date and title; (2) the recitals; (3) the declaratory part, if any; and, (4) the order or mandatory part. * * * A short recital of the answers, affidavits and other evidence read, is entered in this (second) part of the decree."

2 Daniell's Ch. Pl. & Pr., 6 Am. Ed. 1002-3.*

Now, note the recitals of our decree. There is a reference to the motion to dismiss, but none to the order of dismissal already entered with the addition *"Let decree be entered accordingly,"* for this decree follows as a necessary sequence: This cause COMING ON TO BE HEARD upon the application of the defendant Joseph Swift for leave to withdraw from his answer * * * and submit to a decree in plaintiff's favor on such terms as may be found equitable and just; and upon the order granted September 26, 1895, by the judge of this court, requiring the plaintiff or his solicitors to show cause why * * * *or such other order be made in the premises as might be meet and according to equity;* AND THE SAME BEING NOW HEARD before this

court, upon the petition of Joseph Swift, verified by his solicitor * * * and upon the resisting affidavit of the plaintiff, Donald A. McPherson; and at the same time the complainant by his solicitors filing his motion in this court to dismiss his bill of complaint * * * AND THE COURT HAVING HEARD THE MATTERS IN CONTROVERSY UPON THE AFFIDAVITS AFORESAID, AND THE BILL OF COMPLAINT, VERIFIED ANSWER AND REPLICATION ON FILE HEREIN, AND BEING FULLY ADVISED IN THE PREMISES, it is now ORDERED that the application of the defendant be and the same is hereby denied, and the order to show cause granted September 26, 1895, be and the same is hereby vacated and discharged. It is further ORDERED, CONSIDERED, ADJUDGED AND DECREED, that this suit and the bill of complaint heretofore filed herein on behalf of the complainant and against the defendant be and the same is hereby dismissed. It is further *ordered and adjudged*, that defendant have and recover of and from the complainant, Donald A. McPherson, the costs of this suit taxed at $30.30."

This answers all the requirements of a final judgment. It was rendered (1) after a hearing, (2) upon the pleadings and the affidavits; (3) upon being fully advised; and (4) it is "ordered, considered, adjudged and decreed" without qualifying words, and awards costs. **It was and is a finality.**

(b) The construction of similar terms used in decrees, and the presumptions arising from the lack of qualifying words or phrases, have been a frequent subject of consideration in the text-books and cases.

"The dismissal of a bill in chancery stands nearly on the same footing as a judgment at law, *and will be presumed to be a final and conclusive adjudication on the merits, whether they were or were not heard and determined, unless the contrary is apparent on the face of the pleadings, or in the decree of the court.*"

1 Freeman on Judgments, sec. 270.

"A former decree in a suit in equity, between the same parties and for the same subject matter, is also a good defense in equity, even although it be a decree, merely dismissing the bill, if the dismissal is not expressed to be without prejudice."

Story's Equity Jurisprudence, sec. 1523.

"If the plaintiff, after the cause is set down to be heard, causes a bill to be dismissed on his own application, or if the cause is called on to be heard in court and the plaintiff makes default, and by reason thereof the bill is dismissed, such dismissal, unless the court otherwise orders, is equivalent to a dismissal on the merits and may be pleaded in bar to another suit for the same matter."

1 Daniell's Ch. Pl. & Pr., 6th Am. Ed., 659* and 793*.

"When a decree does not adjourn the consideration of the cause, it is said to be a 'final decree,' and when duly signed and enrolled, may be pleaded to any bill for the same matter. Of this nature is a decree dismissing the plaintiff's bill; which as we have said before may be pleaded in bar to a new suit, unless accompanied with the direction that the dismissal is to be without prejudice to the plaintiff's right to file another bill."

2 Daniell's Ch. Pl. & Pr., 994*.

"Where a case has been reversed and remanded by the Supreme Court with directions to dismiss the bill, this was done and the decree or order of dismissal was afterwards set up as a bar to the new suit; the court

said: 'It was not a conditional dismissal, without prejudice. or words to that effect, but a general one. A dismissal of the bill under such directions is presumed to be upon the merits, unless it be otherwise stated in the decree of dismissal.'"

Baker v. Cummings, 181 U. S. 117, 125.

"In another case which we do not find in the regular edition, the bill alleged, *inter alia*, that a former bill had been dismissed, by reason of the default of a replication to the plea. The court says: 'What the plea was, does not appear, but as the bill was dismissed absolutely, the presumption is that it went to the merits.'"

Leary v. Long, 26 L. Ed. 301.

"The dismissal of a suit for infringement of a patent is a complete estoppel in favor of the successful party in a subsequent action upon the same state of facts except for a subsequent period of infringement, even if the new action is based upon a different theory."

Hubbell v. U. S., 171 U. S. 203.

So of a trademark suit.

Underwear Co. v. Underwear Co. 65 Fed. 424.

"A judgment is conclusive as to all the *media contudendi*, and it needs no authority to show that it cannot be impeached either in or out of the state by showing that it was based upon a mistake of law."

Am. Exp. Co. v. Mullins, 212 U. S. 311, 314.

"Where the court that had examined a bill in equity with the pleadings and evidence, has entered on the docket 'dismissed' without other words of qualification, such entry is conclusive of the merits of the case and a final determination of the controversy between the parties, both in equity and at law, and a motion to amend the record by adding the words 'without prejudice' should be denied."

Gove v. Lyford, 44 N. H. 525.

In an early Virginia case there was a decree in general terms dismissing the bill with costs.

"No grounds are specified as those on which the decree is based nor is there any reservation of the right to sue at a future period for the third conceded to be properly held by Mrs. D. for life; and in the absence of any specifications of the ground on which it was based and of such a reservation, the decree must be taken to rest upon each and all the issues presented by the pleadings, and must be regarded as a final adjudication of the entire right."

Taylor v. Yarborough, 13 Gratt. 183.

In a Massachusetts case often cited—opinion by Chief Justice Shaw, the former decree was;

"And now in this term before the court have come the parties by their said attorneys, and this action is dismissed on motion of defendants. Defendants ask costs which are granted."

The contention was, that as it did not appear by the plea in the present suit, nor by the record that the former suit was dismissed upon the merits, the decree of dismissal was not a bar. But the court held otherwise:

"The authorities both in England and in this country are decisive, that a general entry of 'bill dismissed,' with no words of qualification, such as 'dismissed without prejudice,' or 'without prejudice to an action at law,' or the like, is conclusively presumed to be upon the merits and is a final determination of the controversy."

Foot v. Gibbs, 1 Gray 412.

A later case in the same state has been already cited: A bill in equity had been filed to redeem from a mortgage, an answer under oath made, and the plaintiff without the knowledge of defendant, dismissed after the time for replication and taking of testimony had elapsed. The

decree in defendant's favor was held to be a bar to a subsequent action.

Borrowscale v. Tuttle, 5 Allen 377.

In a case in Michigan the decree in the former suit was: "This cause having come on to be heard upon pleadings and proofs to be taken in open court, upon consent of complainant in open court, it is ordered, adjudged and decreed by the court now here, that the complainant's bill of complaint be and the same is hereby dismissed, with costs to complainant to be taxed and that defendant have execution therefor." This was pleaded in bar to the second suit, and the plea was sustained.

Edgar v. Buck, 65 Mich. 356.

In a later case from the same state the former decree pleaded in bar was: "This cause came on to be heard on bill and answer, and it is hereby adjudged and decreed that said bill be dismissed with costs, to be taxed, and that said defendant have execution thereof." The court cites several cases approvingly, and concludes: "The prior case, then, having been heard in open court upon bill and sworn answer, in which the proceedings of 1895 to lay out this highway were set up, and where their legality was averred, it must be said the case was heard upon the merits and is *res adjudicata*."

Schulmeister v. Blendon Tp. 126 Mich. 488.

In an Iowa case the decree of a federal court was given the force and effect to which it was entitled in the court where rendered. The decree in the United States Circuit Court was: "This cause came on this day for hearing; Messrs. Gatch, Wright & Runnels withdrew their appearance as attorneys for complainant, and the defendant appeared by D. Rorer, Esq., and there-

upon the cause was submitted to the court upon the pleadings and proofs, and the court being fully advised, orders, adjudges and decrees that complainant's bill be dismissed with costs, that the defendant recover from complainant its costs herein to be taxed." This decree in equity was subsequently pleaded in bar to an action at law in the state court. There was a demurrer on the ground that "The judgment pleaded as a bar was only an entry of dismissal, because no person appeared on the part of the plaintiff, and that the merits of the cause were never discussed," etc. The court below sustained the demurrer in part and defendant appealed. The Supreme Court reversed the lower court, and gave to the decree the force and effect of such decrees in United States courts (regardless of state statutes or practice), including also the force of the answer as evidence, citing several of the cases we have cited here, and held the decree a bar.

Scully v. R. R. Co., 46 Iowa 528.

In a case which came to this Court from Kentucky, on error to review a judgment which affirmed on a third appeal a judgment of a circuit court in that state—held to be the first final judgment, because there was reversal on each of the other appeals—the facts were: After the action had been begun in state court, defendant filed petition and bond for removal to federal court, which the state court granted, but plaintiff appealed and the order was reversed and case remanded for trial (112 Ky. 861). The trial was had and jury returned an instructed verdict for plaintiff. This judgment was reversed (89 S. W. 683). A new trial was had resulting in a verdict and judgment for plaintiff for $2,500. This was sustained on appeal (100 S. W. 219). To review

that judgment the writ of error was taken. The record shows that after the appeal from the order of removal, defendant in the case who had secured the order filed a transcript of the record in the federal court. After the reversal by the state court of appeals of the order of removal, a motion was made in federal court to remand. This was denied. The defendant answered, and on its motion the case was set down for trial. On the day set, this defendant moved for judgment on the pleadings. This motion was granted, also a demurrer of another defendant sustained, and judgment rendered. The defendants thereupon offered for filing in the state court, before the last trial there, an amended answer setting up these proceedings and the judgment of dismissal as a bar. The motion to file this answer was denied by the state court but by its order made a part of the record. It was, therefore, before the Court of Appeals when it affirmed the judgment. It was the principal point considered in this Court, which reversed the judgment of the Kentucky Court of Appeals and pronounced the judgment of dismissal a bar. Through the kindness of the Clerk of this Court, we reproduce from the record the judgment of dismissal below: "The court having considered of the demurrer of defendant, the Maysville and Big Sandy Ry. Company to plaintiff's petition, and being advised sustains same, and plaintiff failing and declining to plead further, it is adjudged that said petition as to said defendant be dismissed. The court having considered the motion of the defendant, the Chesapeake and Ohio Ry. Company, for a judgment here in its favor on the face of the pleadings, and being advised, sustains same, and it is adjudged that plaintiff take nothing by her petition against said defendant, and that same as to

said defendant be dismissed. It is further adjudged that each of the defendants recover of plaintiff its costs," etc.

Ry. Co. v. McCabe, 213 U. S. 207.

Another case from this Court already cited, is interesting as holding that a judgment is property, protected by the due process of law clause of the constitution; and that a prior judgment in defendant's favor without findings of fact (in New York where these are required) was *res adjudicata* of every issue that could have been considered, and operated to defeat recovery in a subsequent action.

Fayerweather v. Ritch, 195 U. S. 276.

In the absence of the words "without prejudice" or other equivalent qualifications, it is held in the federal courts, and in those maintaining separate jurisdictions for law and chancery, that the decree is presumptively on the merits. In addition to cases already cited, we refer to the following:

Durant v. The Essex Co., 7 Wall 107.
Case v. Beauregard, 101 U. S. 688.
Lyon v. Mfg. Co., 125 U. S. 698.
Lawrence v. Nelson, 143 U. S. 215.
Thurston v. Thurston, 99 Mass. 39.
Bigelow v. Winsor, 1 Gray 299, 301.
Blackinton v. Blackinton, 113 Mass. 231.
Knowlton v. Hanbury, 117 Ill. 471.
Stickney v. Goudy, 132 Ill. 213.
Adams v. Cameron, 40 Mich. 506.
Billing v. Gilmer, 60 Fed. 332, 336.

But the South Dakota court measured this decree by the test of its own decisions, and held its recitals did not import finality (Opinion, Trans., p. 59).

(c) It held, however, in its first decision that parol testimony was admissible upon the question of finality (Trans. of Record, p. 69); and accepting that as the law for the state, we introduced such testimony on the second trial. But having in mind the decision of this Court in Fayerweather v. Ritch, 195 U. S. 276, forbidding the trial judge to testify as to what he had in mind in arriving at his decision, we doubted the competency of any testimony in a review here on writ of error from a state court, where findings and conclusions had been made and were a part of the record as required by state law. The line seems to be sometimes difficult to draw.

K. C. S. Ry. Co. v. Com. Co., 223 U. S. 573.
Creswell v. Grand Lodge, 225 U. S. 246.
Jenkins v. Neff, 186 U. S. 230, 235.
Chrisman v. Miller, 197 U. S. 313.
Ry. Co. v. Texas, 204 U. S. 403, 411.
Portland R. L. & P. Co. v. R. R. Com., U. S. Sup. Ct., June 10, 1913.

The case of Kansas City Southern Railway Co. v. Commission Co., 223 U. S. 573, at 591-3, states the exceptions to the rule: "Perhaps the most frequent exercise of this power occurs in cases arising under the clause of the Constitution forbidding a state to pass any law impairing the obligation of a contract, the existence of the contract in such cases being a mixed question of law and fact. * * * A like exercise of this power is shown in cases arising under the clause of the Constitution requiring full faith and credit to be given in each state to the judicial proceedings of every other state. Huntington v. Attrill, 146 U. S. 657, 683, was such a case."

Of course our contention is that testimony seeking to vary or contradict this decree of February 22, 1896,

would be incompetent, while testimony tending to support it, if of doubtful meaning, may be proper. The case already referred to in this Court stated the general rule, and then added for that case: "Tested by the rule laid down, the testimony of the trial judge, given six years after the case had been disposed of, *in respect to the matters he considered and passed upon, was obviously incompetent.* * * * No evidence should be received except of open and tangible facts—matters ~~are~~ susceptible of evidence on both sides. A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed, and *ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision.*"

Fayerweather v. Ritch, 195 U. S. 276.

Mr. Freeman's rule is the same: "It is important that the evidence offered to explain a record, should not contradict it. For it cannot be shown in opposition to the record, that a question which appears by it to have been settled, was not in fact decided, nor that, while a special cause of action was in issue, a different matter was in truth litigated. * * * *Parol proof can be given to show the grounds of a judgment only when such grounds do not appear from the record itself.*"

Freeman on Judgments (3 ed.), sec. 275.

So is Mr. Black's: "Extrinsic evidence, *when not inconsistent with the record and not impugning its verity,* is admissible for the purpose of identifying the points litigated and decided in a former action between the same parties, when the judgment therein is set up as a bar or estoppel in the case on trial" (sec. 624); as "if the record is silent or ambiguous as to the points at issue and the grounds of the decision, parol evidence is

not only competent to identify the questions adjudged, but *it may become necessary in order to insure the effect of the judgment as an estoppel.*" He then gives illustrations, and adds as the conclusion of the whole matter: "It is very necessary to be borne in mind, in connection with the rules just stated, that the averments or disclosures of the record, in respect to the matters decided, *cannot be controverted by any extraneous evidence.* They may be explained, when ambiguous. They may be made specific, when generally expressed. *But they cannot be contradicted.* When it is apparent on the face of the proceedings in the former action, that the question in controversy was litigated therein, the mere production of the record will be enough."

Black on Judgments, secs. 624-5.

Now, by these tests, consider the testimony as to this decree found in the present record. Swift's attorney testified in support of the decree; plaintiff tried to contradict him; and his own attorney's testimony given on the former trial was offered to impeach the decree. The only two material answers of McPherson's attorney were objected to as clearly incompetent. One denied the merits had been gone into or examined by the court—a mere conclusion (Addl. Trans., p. 43)—the other was substantially the same, "No issues were submitted at any time and none passed upon by the court" (Ibid, p. 44)—a contradiction of the decree's recital that a hearing was had on the affidavits and bill and answer. Aside from this, there is the same statement (Ibid, p. 43), "that no evidence was taken on either side that was submitted to the court, and no evidence was submitted to the court." This can mean only that no witnesses' testimony was taken or submitted, for plenty of evidence was there in pleadings and affidavits.

Swift's attorney, verifying his petition, declared plaintiff had not taken any evidence or taken any steps to get ready for trial (pp. 25-6), and this was not contradicted upon the hearing February 22, 1896. He also testified on the last trial (Main Trans., p. 95): "The recital in the judgment is correct. It was based upon the affidavits and pleadings. There was no waiver of a verified answer. The answer was verified by defendant. The case had been pending for over three years. The time had long passed for taking testimony and no extension asked or granted." This attorney's testimony throughout supports the decree as a final dismissal. He states that plaintiff's attorney brought into court the order of dismissal in typewriting; that the Judge read it and directed the attorney to add the words, "*Let decree be entered accordingly*" (Main Trans., p. 92), which the attorney then added.

McPherson testified he would not deny this statement, and that these words were in his attorney's handwriting (Addl. Trans., p. 42). The attorney Moody admitted his handwriting also (p. 44). The attorney for Swift testified further that the judge said, "We want to make an end of this litigation" (p. 40). McPherson declared "not a syllable" of the statements testified to were made (Main Trans., p. 96); and "there was not a word uttered as to the proceedings being final in that case" (p. 96), but he admitted the court may have directed Swift's attorney to prepare the decree, as well as his own attorney to add the words to the order, "Let decree be entered accordingly" (Addl. Trans., p. 42); and that he wrote the words in in court (p. 42). Swift's attorney testified that both when the order was signed and when the decree was signed, the Judge declined to add the words, "Without prejudice" for plaintiff's at-

torney, and the words "on the merits" for Swift's attorney; he also testified that the Judge said to him in the presence of the other attorney: "It is not necessary to enter the words 'on the merits' in a judgment in federal court. Look at your federal decisions; they are uniform. The words 'on the merits' are not necessary to its finality." And witness prepared the decree under that instruction (p. 40). McPherson denied hearing this conversation (p. 42). Swift's attorney further testified that when he presented the decree for signature the Judge said, "This is all you can ask," and that witness answered, "No, we would rather have had Mr. McPherson for a partner. If this decree is to be entered, I would rather have the words 'on the merits' in." And that the Judge answered: "It is not necessary. Look at your federal decisions" (Main Trans., pp. 93-4). McPherson admits he was not present when the decree was signed (Addl. Trans., pp. 42-3).

As Swift's attorney testified positively to remarks of the Judge, both when the order was presented for signature (denied with qualifications by plaintiff), and when the decree was presented (plaintiff admittedly not present), it leaves this Court with little conflict in the testimony. We except of course plaintiff's statement of a remark he alleges was made by the Judge to Swift's attorney "in jocular way" (Main Trans., p. 96), "that by the dismissal of my suit, based upon my affidavit, he was attaining the same result as by the granting of his order—that is, he would get me as a partner." This Swift's attorney contradicted (Addl. Trans., p. 45), and gave as his reason for feeling positive no such remark was made, that it was just what he wanted and was instructed to get, and hence he should have responded, "That is just what we want!" (p. 45). If plaintiff

heard such a remark, it struck on unwilling ears, so far as he was concerned, as he did not reoffer himself as a partner for over five years, or until the bringing of the present suit, in June, 1901.

Now analyze this decree and the circumstances leading up to it. Plaintiff's attorney either wanted an absolute dismissal or one of doubtful import that could be a subject of future construction or "option"—hence no reservation in affidavit, motion or order; defendant's attorney wanted an accounting and the money offered in the bill for a sale of a half interest to plaintiff. The Judge decided against both—that he would not force plaintiff into a distasteful co-ownership, but he would not let him go out to begin again. So, when the decision was made to deny Swift's application, and grant plaintiff's motion to dismiss his bill of complaint, and the order in doubtful form was presented, the Judge directed the addition of the words, "*Let decree be entered accordingly,*" to make certain that which was left uncertain. Then who should draw the decree? If intended to serve the plaintiff, his attorney; if intended to serve Swift, then his attorney. The latter was directed to draw it, and did draw it. How natural for him to ask for the phrase "on the merits." And the Judge must have given a reason for excluding it, not unfriendly to the party whose attorney had been directed to draw this decree, and not inconsistent with his direction to prepare it, *in addition to the order*—hence a remark, "not necessary; look at your federal decisions!" These are the "probabilities." And defendant's attorney, evidently knowing the value of a verified answer, where verification was not waived, and a hearing on bill and answer, proceeded to prepare what he did. Shall he be charged with drawing a decree to dismiss without prejudice,

when this was not found in plaintiff's affidavit, nor in his attorney's motion, nor in his order, nor in the mind of the Judge? Shall he be charged with anything except an effort to serve his client to the best of his ability? Should he not be the best witness of the purpose and intent of that decree? And does it not bear the clearest intent of finality? Look at the terms used, and not used: Not a reference to the order of dismissal just signed, not a recognition of it, not an order now but a judgment and decree of dismissal. He was drawing this paper in obedience to the direction, "*Let decree be entered accordingly,*" and a decree meant more than an order. So he writes: "*This cause coming on to be heard, upon the application of the defendant,* * * * *and the same being now heard before the court,* on the petition of Swift verified, etc., and the resisting affidavit of plaintiff, at the same time plaintiff's solicitors moving to dismiss, etc., and the *court having heard the matters in controversy upon the affidavits aforesaid, and the bill of complaint, verified answer,* etc., *and being fully advised in the premises,* orders (only) that the application of defendant be denied, and the order to show cause * * * discharged; and IT IS FURTHER ORDERED, CONSIDERED, ADJUDGED AND DECREED THAT THIS SUIT AND THE BILL OF COMPLAINT HERETOFORE FILED HEREIN ON BEHALF OF THE COMPLAINANT AND AGAINST THE DEFENDANT BE AND THE SAME IS HEREBY DISMISSED." Then further ordered and adjudged that defendant have and recover his costs.

What must this Court conclude? Clearly that the decree was intended to be final by the Judge who ordered it, by the attorney who drew it under his directions, by the federal decisions to which he referred him, and which he has since examined and submits in this brief.

Testimony in aid of that decree is competent; testimony to vary and contradict (objected to) was incompetent.

11. *The State Decision Wrong.*

It follows that the state court erred in its judgment of affirmance (1) for ruling in and by its opinion against the "federal question," (2) for approving the findings of the trial court in conflict with finding No. 13; (3) for approving the trial court's erroneous conclusions denying the full force and effect of the federal proceedings and decree and Swift's property right therein, (4) approving the trial court's rejection of Swift's offered conclusions of law, Nos. 10, 11, 12, 13, 14, 17 and 21 (Trans. of Record, pp. 40-41), which presented the federal question; (5) approving the trial court's judgment making a money award and assuming to divest title to plaintiff's property without due process of law; (6) without any ground on which to base its decision, except a denial of Swift's constitutional rights. There was grave injury done to plaintiff in error by this denial of his rights.

(a) Swift rendered an account in the federal court at McPherson's request, and by which he was bound, showing $29,116.10 charged to the investment, of which McPherson would have been obligated to pay $14,558.05 (Addl. Trans., pp. 18-19), on the terms of his tender. The latter waited over five years, and now calculates interest in violation of the rates provided for in the agreement, and takes judgment against Swift for one-half of $22,375.12, or $11,187.56, without compensation of any kind for his services, and also a decree quieting and confirming title out of Swift (in undisputed adverse possession) to a half interest in the remaining property (Main Trans., p. 53).

(b) At the time of Swift's account but one piece of property had been sold for a sum of $2,300 (Addl. Trans., p. 18). At the time of the trial of the present action, according to the court's finding there had been sales amounting to $56,436.75 (Trans. of Record, p. 48).. It must be conclusively presumed—in pursuance of McPherson's construction of this contract as an "option" (Addl. Trans., p. 29), and his belief that he was not called upon to move until the receipts had repaid the investment with interest—that these sales occurred very recently before June, 1901, and were the moving cause of the beginning of this action.

(c) The court committed grave error in awarding a money judgment to McPherson, and quieting title in him to property of Swift and in his possession in defiance of the decree of February 22, 1896, and without due process of law.

(d) But treating this as an action for specific performance as the first was—found to be "upon the same contract and for the same relief"—and assuming (for the purpose of the argument only) this was a contract between vendor and vendee—what is the rule? While the American courts differ as to the necessity for a tender (3 Pomeroy's Equity, sec. 1407, and notes), they agree that delay must be explained and accounted for. They also agree that this remedy is one of grace and not of right; that the granting of relief rests in the sound discretion of the court. And to entitle a party to specific performance the rule is, there must be mutuality both as to the obligation and the remedy. If the contract cannot be enforced against one party that party is equally incapable of enforcing it specifically against the other. (See South Dakota Statute, *ante*.)

Duff v. Hopkins, 33 Fed. 599, 608.

McPherson accepted a decree dismissing his bill for specific performance February 22, 1896, is he entitled to a decree now for what was then denied?

A dismissal of a bill for specific performance is a bar to a new bill for the same object.

> Hepburn heirs v. Dunlop, 1 Wheat. 179, 195.
> Ogsbury v. La Farge, 2 N. Y. 113.

Equity will not relieve one who has lain by until events enabled him to make election as to completing the contract, with certainty of advantage to himself.

> Hollingsworth v. Fry, 4 Dall. 345, 348.
> Davison v. Davis, 125 U. S. 90.
> Galliher v. Cadwell, 145 U. S. 368, 373.
> McCabe v. Matthews, 155 U. S. 550.
> Lemoine v. Dunklin Co., 51 Fed. 487, 492.
> Jones v. Perkins, 76 Fed. 82, 84.

"Specific performance will not be decreed after a considerable lapse of time and a great change in title and value, in favor of a vendee who has failed to perform his part of the contract, *and who would have been totally unable to comply had circumstances taken an unfavorable direction.*" (As here when the property went down in value; Miller's estate insolvent, and plaintiff unwilling to keep his tender good.)

> Brashier v. Gratz, 6 Wheat. 528.
> Mundy v. Davis, 20 Fed. 353.
> Garnett v. Macon, Fed. Cas. No. 5245.
> Prentice v. Betteley, Ibid. No. 11, 381.
> Tufts v. Tufts, Ibid. No. 14, 233.

"If the party seeking specific performance has been guilty of gross laches * * * or if there has been in the intermediate period a material change of circumstances affecting the rights, interests or obligations of the parties—in all such cases courts of equity will re-

fuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust."

Holgate v. Eaton Adm., 116 U. S. 33, 40-41.

But was there anything in this contract that could be specifically enforced? No; neither employment, nor authority to make sales, nor agreement for conveyance.

(e) The court finds "nor was there any enhanced or increased value of the property in controversy by reason of any efforts, labors or expenditures" (Trans. of Record, p. 51). Yet in finding No. 11 (p. 48) it is recited that against the gross account for rents and sales, $103,437.07, there should be credited Swift on account of "costs and expenses for taxes, insurance, repairs, improvements, additional investments for improvements," and the principal and interest, enough to reduce this total to $22,375.12, to-wit, $81,061.95. How can these inconsistent findings be reconciled? It must be conclusively presumed, in spite of the hostile finding, that Swift's efforts, labors and expenditures did enhance values and lead to sales.

(f) Again, how reasonable the probability of the misrepresentations being made by Miller, as the "inducing cause," alleged in paragraph 14 of the federal court answer (Addl. Trans., p. 23), as to his solvency and ability to share a possible loss on this investment of $18,500, when the bill there (p. 8) and the complaint in this action (Trans., p. 2) and finding No. 3 (Addl. Trans., p. 2) all allege his insolvency and indebtedness of over $100,000 at the time of his death—less than three years later? It must be inferred that Swift then believed the representations of solvency true and that he would not have made the agreement otherwise.

(g) And the allegation in paragraph No. 14 in the federal court answer, as to a secret commission retained

(Addl. Trans., pp. 23-4) was proven by the verified answer as evidence, and presumptively could have been proved by testimony then, not available at the last trial. That "concealment" was a good defense to specific performance under South Dakota law *ante*.

(h) The appeal from county court proceedings pending at the time of the answer in federal court (Addl. Trans., p. 17) was dismissed in the spring of 1895 (finding No. 7, Trans., p. 46)—presumptively in reliance by Swift upon negotiations then begun with McPherson and his attorney to sell to McPherson a half interest on the terms of McPherson's offer and tender.

(i) Lest counsel may contend that McPherson may lose by a reversal, upon a theory that he paid a consideration to the administrator for his purchase—denied absolutely in federal court answer (Addl. Trans., p. 16) —we suggest that the record shows objections and protest in county court (Ibid., p. 3, fdg. No. 6)—so he knew he was buying into a law suit then (Addl. Trans., p. 3). It further shows that Swift duly prosecuted an appeal (Ibid., p. 3, fdg. No. 7), which means within ten days by South Dakota statute (Comp. Laws 1887, already cited *ante*), and therefore pending on January 11, 1893, when he took his deed (p. 3, fdg. No. 5). It further shows that in the verified answer the whole county court proceedings were alleged to be illegal and void, and the deed premature and void (Addl. Trans., p. 16). The answer further alleged the administrator to be interested in the purchase and sale and deed for that reason void (p. 17). And plaintiff carefully provided a chance of reimbursement, by stating as one of his facts in the trial court's last decision, that the administrator "has continued to act," and that his "letters have not been revoked" (p. 2, fdg. No. 2). This is not a case of inno-

cent purchaser. "The law is that he who intermeddles with property in litigation does it at his peril. * * * He took the chances and must abide the result."

Tilton v. Cofield, 93 U. S. 163.
Lacassagne v. Chapin, 144 U. S. 119, 125.

(j) That the administrator could become vested with a title or interest in the contract as alleged in the complaint (Trans., p. 2) and found as a fact—(finding No. 2, p. 44) is in contradiction of the law of a South Dakota decision (Elder, Adm. v. Horseshoe M. & M. Co., 9 S. D. 636, 642) so doubly grave error.

## CONCLUSION.

We insist, upon this whole record, and for all the reasons urged, that a grave injustice was done to plaintiff in error by the decision and judgment of the Supreme Court of South Dakota. It was a violation of section 709 of the U. S. Compiled Statutes for that it decided against the validity of the federal court decree of February 22, 1896, as a final decree in Swift's favor; and sustained the validity of the state court's authority in making such a decision; it was against the title, rights, privileges and immunities specially set up and claimed by plaintiff in error under section X of Article I, and section I of Article IV of the Constitution, and Articles V and XIV of the Amendments to the Constitution. It impaired the obligation of said decree as a contract; it denied full faith and credit to a federal court judgment and judicial proceedings; it deprived plaintiff in error of his property without due process of law, and denied to him the equal protection of the laws.

We confidently believe this Honorable Court will reverse the decision and judgment of the South Dakota

Supreme Court, and direct it to reverse that of the trial court, and remand with directions to dismiss the complaint and cause of action of defendant in error.

Respectfully submitted,

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# In the Supreme Court

## OF THE

# UNITED STATES

OCTOBER TERM, 1913.

NO. 77.

JOSEPH SWIFT, Plaintiff in Error.

vs

DONALD A. McPHERSON, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF the STATE OF SOUTH DAKOTA.

## BRIEF OF DEFENDANT IN ERROR.

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## BRIEF OF DEFENDANT IN ERROR

Notwithstanding the 110 page brief of plaintiff in error, the questions to be decided by this Court in the case at bar are neither numerous nor complex. In fact there are but two questions for the

Court,—first, is there a federal question presented by the record, and second, was that question properly decided by the State court?

This present action was begun in the Circuit Court of Lawrence County, South Dakota, on June 17, 1901. The federal question sought to be raised is based upon the fact that prior to the commencement of this suit the plaintiff, McPherson, had instituted an action in the Federal Court of the District of South Dakota against plaintiff in error, Swift, upon the same cause of action involved here, and that McPherson's complaint in the Federal Court was dismissed. It is claimed that the federal decree was upon the merits and a bar to the present suit. It is further claimed that the refusal of the state court to construe the decree in the federal court as a bar is a refusal to give full faith and credit to the federal decree and in this manner presents a federal question.

Plaintiff in error in his brief has discussed every conceivable proposition of law presented in the two trials in the state court of the present action, and has exhibited great diligence in furnishing authorities in support of such propositions. As we understand the law it is not incumbent upon us to meet seriatim these various points thus discussed for the reason that

I.

ON ERROR FROM THE SUPREME COURT TO THE HIGHEST COURT OF A STATE THE SOLE QUESTION IS WHETHER THE LATTER'S PROCEEDINGS HAVE DENIED A

**FEDERAL RIGHT. ALL OTHER QUESTIONS ARE CONCLUDED BY THE STATE COURT'S DECISION.**

*Vol. 1 Rose's Code of Federal Procedure, Pages 110 and 222 and cases cited.*

*Dower vs. Richards*, 151 *U. S.* 658, 38 *Law Ed.* 305.

*Vol. 2 Rose's Code on Federal Procedure, Section 2084.*

*National Foundry Works vs. O'Conto Co.* 183 *U. S.* 216; 46 *Law Ed.* 769.

## II.

## THERE IS NO FEDERAL QUESTION INVOLVED

At the trial of this action in the state court the plaintiff in error, having already introduced in evidence the entire record of all proceedings in the Federal Court leading up to and including the decree which it is now contended is a bar against the plaintiff's present action, thereupon offered parol testimony for the purpose of proving dehors the record that such decree was upon the merits. This evidence was offered through the witness Edwin Van Cise, attorney for plaintiff in error. To the offer of such evidence the defendant in error objected, for the reason that all such parol testimony was immaterial, incompetent and irrelevant, as tending to vary by parol the record of the United States court, and that if such testimony was not offered for that purpose then it was wholly immaterial and irrelevant, and upon the ground that

the record itself was the best and only evidence. (See Transcript of Record, pp. 91-92). The objections of defendant in error were overruled by the trial court, and the testimony of the witness Edwin Van Cise was admitted. This evidence tended to show that notwithstanding the absence from the decree of the Federal Court of the words "the bill being without equity," or the words "upon the merits," nevertheless the federal judge declared that the decree was intended to be upon the merits and a final end of all litigation between the parties. To meet this testimony the defendant in error introduced the evidence of Judge G. C. Moody and of the plaintiff McPherson, and also cross examined to some purpose the witness Van Cise. It is thus seen that the parol evidence in the trial of the present action, which resulted in the judgment here sought to be reversed, was forced into the record by plaintiff in error, over strenuous objection of the defendant in error. Not only did plaintiff in error thus inject parol evidence into the record but thereupon requested the court to make a separate finding based upon such parol evidence. (See plaintiff in error's request No. 24, at page 34, also requests numbered 14 and 15, at pages 30 and 31, of Transcript of Record).

The trial court rejected such requests and thereupon in separate Finding No. 14, specifically found:

> "That no evidence, testimony or proofs was ever taken or submitted in said action upon the hearing of said motion of the defendant, Joseph Swift, for leave to withdraw from the

answer of said Joseph Swift paragraphs 13 and 14 thereof and submit to a decree in plaintiff's favor, nor upon the hearing of said motion of the said complainant, Donald A. McPherson, for leave to dismiss his bill of complaint in said action, and that there was no hearing or trial in said action in said United States court upon the merits, and that the said bill of complaint of said complainant, Donald A. McPherson, therein, was not dismissed upon the merits nor for want of equity."

(Additional Trans. of Record, p. 31).

This finding is overwhelmingly sustained by the parol evidence introduced by both parties. (Transcript of Record, pp. 91-96; Additional Trans. of Record, pp. 40-45; Additional Record designated by defendant in error, pp. 47-49, printed on separate sheets).

AND EVEN THOUGH SOME DOUBT EXISTED AS TO THE WEIGHT OF EVIDENCE THIS COURT WILL NOT REVIEW A DECISION OF THE STATE COURT ON QUESTIONS OF FACT.

*Dower vs. Richards*, 151 *U. S.*, 658: 38 *L. Ed.* 305.

*Vol.* 2 *Rose's Code of Federal Procedure, Section* 2084.

*Chrisman vs. Miller* 197 *U. S.* 313. 49 *Law Ed.* 770.

In view, therefore, of Finding No. 14 of the state trial court, it is clear that the decision and judgment of the state court may well have been

based upon independent grounds not involving a federal question, and sufficiently broad to maintain the judgment. In other words, it is clear that the judgment may have been entered by the state court without passing upon the alleged federal question now sought to be injected in the case. If this be true, this court will not entertain the writ of error. If the trial court was wrong in considering parol testimony to explain or even to modify the decree in the federal court, nevertheless this error having been invited by the plaintiff in error, over the objection of the defendant in error, it does not now lie in his mouth to complain. The parol evidence was introduced for the purpose of explaining the federal court decree and the grounds and purposes of its entry, and the trial court having decided that such parol evidence showed conclusively that it was not intended that such decree should be upon the merits, plaintiff in error is clearly bound by this finding of fact thus based upon evidence for the presence of which in the record he is responsible.

## III.

## THE JUDGMENT IN THE FORMER ACTION IN THE FEDERAL COURT IS NOT RES JUDICATA.

The various proceedings in the former suit in the federal court are set forth in detail in Finding No. 13. (Additional trans. of Record, pp. 6 to 30, inclusive). Briefly these proceedings were:

The suit was begun May, 1893 by McPherson,

plaintiff, against Swift, sole defendant. The suit was removed to the Federal Court by Swift. Amended Bill of Complaint was filed August 11th, 1893. Swift filed a demurrer to the amended bill, September 2nd, 1893 upon the ground that the bill did not state a case nor contain any matter of equity entitling complainant to any relief. This demurrer after argument was overruled, and an order to that effect entered May 10th, 1894. Swift then filed his answer to the amended bill. We may say that the amended bill was very much the same as plaintiff's complaint in the case at bar, and the defendant's answer practically the same as the answer in the case at bar except as to the additional defenses now interposed of res judicata, laches and adverse possession. To this answer the plaintiff in accordance with the Federal Equity practice filed a general replication August 6th, 1894. September 26th, 1895, defendant Swift filed a petition supported by affidavits in which petition he offered to submit to a decree in favor of plaintiff and admit plaintiff to joint ownership of the property upon such terms as the court might deem equitable. Upon this petition and affidavit defendant asked leave to withdraw paragraphs 13 and 14 of his answer and *that the court refer the case to a master in chancery to take the testimony.* The defendant in this petition complains that no testimony has been taken though the cause had been at issue since August 1894. Upon this petition and affidavit of defendant an order was issued September 26th, 1895, requiring plaintiff to show cause why defendant should not be allowed to with-

draw from his answer paragraphs 13 and 14 *and the cause to be referred to the master in chancery to take the testimony* and report the same to the court. It is thus quite evident that up to this time no evidence had been taken and the court had not in any way considered the issues upon the merits, except in so far as the order overruling defendant's demurrer had been such a consideration. In short, at this stage of the proceedings the court had already (upon full argument of able counsel) decided *against the defendant as to the force and effect of the contract.* The court had held against defendant's contention. Swift then procured the order to show cause.

The plaintiff McPherson made return to said order to show cause and resisted the granting of the petition of Swift. As a part of his counter-showing McPherson presented his own affidavit.

*Upon this affidavit the plaintiff McPherson moved to discharge said order to show cause and to dismiss his bill of complaint.*

This motion of plaintiff was granted and an order to that effect entered February 22nd, 1896; and to this order *the defendant excepted.*

Upon this order the decree of February 22nd, 1896, was entered. This decree recites the application of defendant Swift to withdraw paragraphs 13 and 14 of his answer and have the cause referred to a master to take testimony, the affidavit of McPherson and his motion to dismiss his bill, and then continues as follows: "And the court having heard the matters in controversy upon the affidavits aforesaid and the bill of complaint, verified

answer and replication on file herein and being fully advised in the premises *it is ordered that the application of defendant is denied and said order to show cause is discharged, and it is adjudged and decreed that the bill of complaint is dismissed and that defendant recover costs." To this decree the defendant excepted!*

It is thus readily seen that there was not a trial of this former case in any sense of the word. It was a dismissal of plaintiff's bill of complaint by the plaintiff himself. The bill was not dismissed by the court by reason of want of equity in the bill—*for indeed, on the contrary, the court had previously upon argument of defendant's demurrer formally adjudged that there was equity in the bill.* It was not a dismissal after trial upon evidence for the decree itself affirmatively denies the defendant's motion to have evidence taken in order that a trial may be had upon the evidence.

The affidavit of McPherson discloses clearly the attitude of plaintiff at the time of dismissing his bill. Swift had for years repudiated his contract with Miller, had denied that plaintiff had by his purchase acquired any interest in the property, had refused McPherson's tender and offer to pay the Miller estate one-half disbursements connected with the property, and in his answer had sought relief from the contract even upon the ground of fraud and failure of consideration. (See bill, Answer and Affidavits in former suit, and particularly McPherson's affidavit. Additional Trans. p. 6).

McPherson in his affidavit says "Affiant in

answer to the petition of defendant attached to the order to show cause herein has moved this Honorable Court to dismiss the Bill of Complaint and desires to have such Bill of Complaint dismissed for the following among other reasons: The tender was withdrawn before the order to show cause was procured. When the tender was made to defendant the property in controversy was of very considerable value, so much so that if affiant's demand had been complied with by the defendant, as it ought to have been at the time of such tender and affiant given an interest in said property, it could have been sold for a sum which would have realized the price which affiant was willing to pay therefor and a considerable profit in addition, but the defendant refused to accept the tender and refused to give affiant any interest whatever in said property, and refused to carry out such contract and denied that plaintiff was entitled to any interest whatever in said contract. * * * *.

*Affiant further says that the contract set out in the Bill of Complaint does not require this affiant to pay any part of the purchase money for said property, but the same is to be paid at affiant's option out of the proceeds of the sales thereof.* Affiant was willing at the time nevertheless to pay all that the said Miller could possibly be under obligation to pay at any time, and take the title to himself of his share of the property, to the end that it might be disposed of while the ruling and market rates of said property were of the character which affiant has indicated, and which would have paid both of the parties a fair profit, *but since defendant's re-*

*fusal to convey for an unreasonable time and the deprecation of the value of the property affiant is not willing now to exceed the strict letter of the contract with reference to the mode and manner of reimbursing the said defendant for the original purchase price thereof.* Wherefore, the complainant prays this court to discharge the order to show cause and dismiss the Bill of Complaint herein as prayed for in his motion. Donald A. McPherson."

In other words, if the court please, Swift refused to admit the claim and accept the tender of McPherson when made, and for two or three years thereafter, at a time when Swift thought the property of great value. On September 26th, 1895, the property having greatly depreciated in value *he asks the court to permit him to accept the tender.* In this connection as to depreciation of values see Finding 20 of the State Court.

McPherson then decides to do what? Surrender all his interest in the property? Not at all. Permit title to be quieted by defendant? Not a bit. *But he insists that the contract does not require him to pay Swift until the property is sold,* and that he *purposes to stand upon the strict letter of the contract for his rights!* In short, to wait until the property shall be sold, or until Swift shall foreclose his rights in a suit brought for that purpose.

The court believed McPherson's statements, approved his construction (for the second time) of the contract, and therefore denied defendant's motion and granted the plaintiff's *and Swift's learned counsel fully understanding the situation saved an exception to the order and the decree!*

**The plaintiff had an absolute right to dismiss without prejudice his Bill:**

*Simpkins Fed. Suit in Equity 2nd Ed. p.* **349** *and cases.*

*Langlois vs. Matthiessen* **40** *N. E.* **496** (*Ill.*)

**6** *Ency. Pl. & Pr.* **833** *and cases in note.*

**1** *Beach Mod. Eq. Pr.* **469-473.**

*The Bainbridge* **199** *Fed. Rep. p.* **404.**

*Morton Trust Company vs. Keith,* **150** *Fed.* **606.**

**In equity practice, obtaining in Federal Court he has this absolute right even after the evidence has been taken and submitted:**

**40** *N. E.* **496** (*supra*).

**In the former suit Swift had filed no cross bill, the exclusive method in the equity practice by which he could have sought affirmative relief.** *And no evidence had been taken by either side.*

**Having thus an absolute right as a matter of course to dismiss his bill without prejudice, there was no reason why McPherson should dismiss it upon the merits.**

**It is true that the judgment does not in terms state that the bill is dismissed without prejudice. Neither does it state that the bill is dismissed upon the merits (as would be the practice in our state courts) nor** *"for want of equity in the Bill"* **(***as* **would be the proper phraseology in the equity practice). But it is not silent as to the record upon which it was based.**

It affirmatively appears from the judgment itself as well as from the record to which it refers that the cause came on, *not for trial,* but "upon application of defendant Swift to amend his answer and upon application of plaintiff McPherson to dismiss his bill." The two motions were heard at the same time. If the judgment had recited that the bill was dismissed "for want of equity" or "upon the merits" or that evidence had been taken and submitted, there would be no doubt but that it would be construed to be upon the merits. Even had the cause been set down for hearing upon bill, answer and replication, the presumption that the decree was entered upon the merits would be more difficult to overcome. But the fact is, as disclosed by the record itself, regardless of the parol testimony offered, that none of these things occurred. Plaintiff did not set down the cause for hearing upon bill and answer, but on the contrary, filed his replication. The defendant did not set down the cause for hearing upon bill, answer and replication, but on the contrary applied to the court, by motion based upon affidavits, as well as the pleadings, for leave to withdraw paragraphs 13 and 14 of his answer and have testimony taken. At the same time plaintiff applied by motion, also based upon affidavits, for leave to dismiss his bill. The court's order and decree recited these facts and proceedings, and thereupon overruled and denied the motion and application of defendant Swift and granted the application of the plaintiff McPherson to dismiss the bill.

The complainant, McPherson, in a federal equity

case had the absolute right to dismiss his bill without prejudice.

*Morton Trust Company vs. Keith*, 150 *Fed.* 606 *and cases cited supra this brief.*

An exception exists where the defendant has filed a cross bill, or where defendant would be deprived of substantial rights which had accrued since the commencement of the suit. Such was not the situation in the federal court in this case. There is therefore no reason why the plaintiff McPherson in the federal court case should have dismissed his bill upon the merits. There was no personal obligation resting upon him, nor his grantor, Miller, or the Miller estate, to pay the defendant Swift. Moreover, McPherson had the absolute right of standing upon his contract and permitting the indebtedness held against the property to be paid by sales from the property. This is exactly what McPherson in his affidavit insisted he intended to do. The following language quoted from McPherson's affidavit conclusively shows his attitude:

> "Affiant further says that the contract set out in the bill of complaint does not require this affiant to pay any part of the purchase money for said property but the same is to be paid at affiant's option out of the proceeds of the sales thereof. * * *. And affiant is not willing now to exceed the strict letter of the contract with reference to the mode and manner of reimbursing the said defendant for the original purchase price thereof. Wherefore the complainant prays this court to discharge the order to show cause and dismiss the bill

of complaint herein as prayed for in this motion."

(Trans, of Record, bottom page 67-68; Additional Trans. of Record, top page 29).

It is settled law that a judgment to be res adjudicata must be on the merits.

*Ex Parte Longgune,* 160 *Fed.* 251-254 *and cases cited.*

*Haldeman vs. United States,* 91 *U. S.* 584, 23 *Law Ed.* 433.

*Stratton vs. Essex* 164 *Fed.* 901.

Counsel for plaintiff in error cites many authorities to the proposition that where the decree is silent as to whether it is upon the merits or without prejudice, that the presumption is that the same is upon the merits. Conceding this to be true, nevertheless the rule is that such presumption is not conclusive but is a rebuttable presumption.

*Stratton vs. Essex* 164 *Fed.* 901.
*Stratton vs. Essex Com.* 145 *Fed.* 436.

And in such case other evidence, even parol, may be introduced to show the grounds of the dismissal.

*Wash. Alex Co., vs. Sickles,* 72 *U. S.* 580: 18 *Law. E.* 550.

*Stratton vs. Essex Com.* 145 *Fed.* 426.

*Stratton vs. Essex Com.* 164 *Fed.* 901.

The difficulty in which plaintiff in error is involved in his efforts to show that the federal court decree was upon the merits is well illustrated by

the assiduity with which he has argued every question of fact involved not only in the present pending action but also in the action in the federal court. Counsel is not even satisfied with the action of the federal court, and after citing several authorities concludes a portion of his argument with this statement:

> "The federal court should in view of the foregoing authorities have denied the application to dismiss as coming too late and granted defendant's application as constituting a contract."

(Plaintiff in error's brief, middle page 65).

Counsel also naively suggests:

> "We contend therefore that Swift's acceptance (i. e., by the motion in the federal court to withdraw paragraphs 13 and 14 and have evidence taken) constituted a contract and that it was too late for McPherson to withdraw."

(Plaintiff in error's brief, page 56).

Unfortunately for the position of counsel in the present case, the learned Federal Court did not agree with plaintiff in error's contention, but on the contrary accepted the view contended for by McPherson. The question here is not what the Federal Court might have decided, nor what it should have decided. The question is, what was actually determined?

The argument of counsel that Swift's offer to withdraw paragraphs 13 and 14 of his federal court answer and accept McPherson's tender of

$9,250.00, constituted a contract, has absolutely nothing whatever to do with the force and effect of the decree in the federal court plead in the present case as res adjudicata. That, if valid at all as a defense in the present action has been effectively disposed of by the state court's decision and judgment. If it had appealed to the Federal Court with any force that court would not have granted McPherson's motion to dismiss his bill, but on the contrary would have granted Swift's application to amend his answer and issued an order for the taking of testimony.

Plaintiff in error laboriously attempts to show that the decree in the Federal Court was entered upon a hearing upon bill and answer and that the sufficiency of the complaint was therein involved and determined adversely to the complainant. The fact is, as shown by the federal decree itself and the record upon which it was based, that the sufficiency of complainant McPherson's bill of complaint in the Federal Court was in no manner involved or questioned at the hearing of the motion of the complainant McPherson to dismiss his bill. The bill of complaint in the Federal Court was never questioned but once. That was upon the defendant's demurrer. This demurrer ,after careful argument, was overruled by the Court. (Additional Trans. of Record, middle page 14). After the overruling of the demurrer complainant McPherson filed his replication. (Additional Trans. of Record, page 25).

But this condition of the record seems to offer no difficulties to counsel's insistence that the mo-

tion of the defendant Swift was a setting down for hearing of the cause upon bill and answer! !

Counsel in his brief states that the case in the Federal Court was set down for hearing on bill and answer only "except that affidavits were also used on the hearing" ! ! (Brief of plaintiff in error, page 83).

There is no such thing as that of a defendant setting down a cause for hearing upon bill and answer. This can be done only by the plaintiff. It is the equivalent of a demurrer to the answer.

*Simkins Federal Suit in Equity, p.* 444.

And where a replication has been filed to the answer and the cause set down for hearing, on bill, answer and replication, then only such allegations of the answer as are responsive to the bill are taken as true. All matters pleaded in avoidance and new matter in the answer not responsive are taken as untrue.

*Simkins Federal Equity Suit, p.* 463.

Such a procedure, however, as supporting the allegations of the bill on one hand and of the answer on the other by affidavits and counter-affidavits for the purpose of disposing of the legal sufficiency of a pleading or of issues framed by the pleadings, would startle a court of the most inferior jurisdiction.

In conclusion it is respectfully submitted that the Supreme Court of South Dakota in its two opinions correctly construed the force and effect of the decree in the Federal Court.

*McPherson vs. Swift*, 22 *S. D.*, 179; 116 *N. W.* 76.

*McPherson vs. Swift* (*2nd appeal*), 27 *S. D.* 296 130 *N. W.* 768.

Respectfully submitted,

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# SWIFT v. McPHERSON.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 77. Argued November 14, 1913.—Decided January 5, 1914.

While there may be a presumption that a dismissal in equity without qualifying words is a final decision on the merits, that presumption of finality disappears when the record shows that the court did not pass upon the merits but dismissed the bill on any ground not going to the merits.

The scope of a decree dismissing a bill in equity must in all cases be measured not only by the allegations of the bill but by the ground of demurrer or motion on which the dismissal is based. *Vicksburg* v. *Henson*, 231 U. S. 259.

A decree of the Circuit Court of the United States dismissing a bill in equity on motion of the parties and not for want of merit *held*, in this case, not to be a bar to a subsequent suit in the state court on the same cause of action, and the refusal of the state court to treat the decree as conclusive on points left open did not deprive the defendant of any Federal right.

27 So. Dak. 296, affirmed.

McPHERSON, as Assignee of Miller, brought suit against Swift in a Circuit Court of South Dakota, seeking to establish his rights to an undivided one-half interest in certain land then in the possession of Swift. The defendant denied that McPherson had any interest in the property. He further claimed that McPherson had once before brought a similar suit which, after being removed to the Circuit Court of the United States, had been dismissed and that this dismissal finally adjudicated the matters at issue in favor of Swift and against McPherson. The record in the former suit was set out in the answer; and as the pleadings in the two cases both deal with the same matters, it will conduce to brevity to state the facts in narrative form.

Swift, on May 8, 1888, purchased a tract of land in Deadwood, South Dak., paying therefor $18,500 and taking the deed in his own name. Miller, who was a resident of Deadwood, had been active in securing the land and, on May 14, 1888, Swift and he made a contract which recited that Miller "had purchased the land for Swift and for joint account." For his services in collecting the rents and looking after the property, Miller was to receive one-half of the net profits, first deducting 8 per cent. interest on the purchase price of $18,500. "In consideration of Miller's agreement to pay Swift one-half of any ultimate loss that might accrue on said purchase, Swift agreed that Miller should receive one-half of the profits ultimately accruing from the sale of the property over and above the purchase price"—$18,500.

Miller died January 12, 1891, and his Administrator obtained an order for the sale of Miller's interest in the land described in the agreement with Swift. After advertisement, this interest was sold to McPherson for $5,005. Thereupon, on May 18, 1893, McPherson filed in the state court a bill against Swift, which was removed to the United States Circuit Court. In it McPherson set out his purchase of Miller's interest, and alleged that at all times since Miller's death, the land could have been sold for a sum largely in excess of $18,500, but that Swift had neglected to sell or to account for the rents and profits. McPherson, in the bill, tendered Swift $9,250, one-half of the original purchase price and demanded a conveyance and an accounting. Swift's demurrer having been overruled he answered, alleging, among other things, that the original contract had been fraudulently procured by Miller, but claiming that if originally valid, it was a mere contract of employment which had been revoked by the death of Miller, and which, therefore, could not pass to McPherson under the Administrator's sale.

A replication was filed. Several terms passed without

any testimony having been taken and Swift finally notified McPherson that he would accept the tender of $9,250 and recognize him as a partner and joint owner on the terms stated in the bill. McPherson made no reply to this offer and thereupon Swift filed a petition in the cause reciting McPherson's refusal to pay the $9,250 tendered in the bill, renewed his offer to accept the tender, and asked leave to withdraw from his answer those paragraphs which set up an affirmative defense and "to submit to a decree in plaintiff's favor on such terms as might by the court be found equitable and just."

A copy of this petition was served on McPherson, who was required to show cause why it should not be granted.

At the February term (1896) McPherson appeared in person and by his solicitors, filed a response under oath in which he moved the court to dismiss his bill of complaint, stating that his tender had been made at a time when the value of the property was such that it could have been sold at a price to net a profit; that Swift had declined to accept the tender and the property was now much depreciated in value; and that the tender had been withdrawn before the procurement of the order to show cause. McPherson's response concluded by the statement that "the contract does not require this affiant to pay any part of the purchase money for the property, but the same is to be paid at affiant's option out of the proceeds of the sale; and while he was willing to have paid the $9,250 at the time the tender was made, the defendant's refusal for an unreasonable time, and the depreciation of the value was so great that affiant is not willing now to exceed the strict letter of the contract in reference to the mode and manner of reimbursing the defendant for the original purchase price, wherefore he prays the court to discharge the order to show cause and to dismiss the complaint herein as prayed for in this motion."

After argument by counsel, the court made an order re-

citing that "the cause coming on to be heard on the application of Swift for leave to withdraw pars. 13 and 14 of his answer and to submit to a decree in plaintiff's favor on such terms as might be equitable . . . and the resisting affidavit of the plaintiff who, at the same time, by his solicitors moved to dismiss the bill . . . and the court having heard the matter upon the affidavit, bill of complaint, verified answer and replication, it is ordered that Swift's application be denied, and it is further adjudged and decreed that this suit and bill of complaint . . . be and the same is hereby dismissed and that defendant have and recover of the plaintiff, McPherson, the costs of this suit." The defendant excepted, but there is no record of any appeal having been taken by Swift.

In June, 1901, five years later, McPherson brought the present suit in the state court alleging that Swift had collected large sums by way of rent on the land and the sale of lots, which sums were more than sufficient to reimburse Swift for the purchase price of $18,500, interest and expenses, and that upon an accounting, McPherson would be entitled to one-half of these net profits and to an undivided one-half of the lots remaining unsold. McPherson prayed for such relief and for partition.

The defendant answered, attacking the validity of the contract. He also set out the proceedings in the former suit and pleaded that decree of dismissal by the United States Circuit Court as a bar to the present suit.

The trial resulted in Swift's favor, but the decree was reversed by the Supreme Court of the State. 22 S. Dak. 165. On the second trial the court found that there had been no fraud on Miller's part; that the contract was not one of employment but created an interest in the property which was assignable; that McPherson was the owner thereof by virtue of the Administrator's sale; that Swift had received $103,436 from rental and sale of land, and

that after proper deductions there was a net profit of $22,374. A decree was thereupon entered in favor of McPherson for $11,187 and also for an undivided one-half of over 100 city lots remaining unsold. On appeal the decree was affirmed (27 S. Dak. 296) and the case was then brought here by writ of error.

*Mr. Edwin Van Cise*, with whom *Mr. William H. Beck*, *Mr. Frank L. Grant* and *Mr. Philip S. Van Cise* were on the brief, for plaintiff in error.

*Mr. Norman T. Mason*, with whom *Mr. Chambers Kellar* and *Mr. James G. Stanley* were on the brief, for defendant in error.

MR. JUSTICE LAMAR, after making the foregoing statement of facts, delivered the opinion of the court.

In the record there are sixty assignments of error involving many rulings of the trial court and the construction of the contract. We can only consider those which present the Federal question that, in failing to sustain the plea of *res judicata*, the court denied plaintiff a right arising under the laws of the United States. The refusal of the state court to treat the decree of the United States court as a bar to the present action is said to have impaired the obligation of that decree as a contract; denied the full faith and credit to which it was entitled and deprived Swift of it as property without due process of law. But all these contentions finally resolve themselves into the single question as to whether the dismissal was on the merits finally adjudicating that McPherson had no enforceable rights under the contract which was the basis of that suit.

Ordinarily, such a question is answered by a mere inspection of the decree—the presumption being that a

dismissal in equity, without qualifying words, is a final decision on the merits. That presumption of finality, however, disappears whenever the record shows that the court did not pass upon the merits but dismissed the bill because of a want of jurisdiction, for want of parties, because the suit was brought prematurely, because the plaintiff had a right to file a subsequent bill on the same subject-matter, or on any other ground not going to the merits. The scope of such decree must in all cases be measured not only by the allegations of the bill, but by the ground of the demurrer or motion on which the dismissal was based. *Hughes* v. *United States*, 4 Wall. 232, 237; *Mayor of Vicksburg* v. *Henson*, 231 U. S. 259.

From an examination of this record it is evident that the dismissal by the United States court was not for want of merit in the bill, because the demurrer had already been overruled. It was not for insufficiency of the testimony, because none had been taken though answer and replication had been filed. It was not a dismissal after a hearing on bill and answer alone, for the defendant was asking to withdraw his affirmative defense and insisting that a decree be entered in favor of McPherson. It was not a dismissal as on a *retraxit*, for the plaintiff not only did not renounce his cause of action, but, in his motion asserted his rights under a contract which provided for a future adjustment of profits and liabilities, whenever the amount of profits or losses was ultimately determined by the actual sale of the land.

McPherson seems, at first, to have assumed that it was not necessary to wait until the property had been sold, but that by a then present payment of $9,250 he could at once acquire title to an undivided half interest in the lots. His tender of that sum was however declined by Swift who, a year or more later, finally decided to accept the money and asked that a decree be entered in McPherson's favor. McPherson then refused to pay what

he had previously offered, explaining in his response to Swift's motion, that since the rejection of the tender the land had decreased in value and, asserting that he was not then willing to do more than was required by the contract —under which he could wait until the ultimate sale of the property to determine what, if anything, he was bound to pay. He thereupon "moved the court to dismiss the bill as prayed for in this motion." The motion was granted, and Swift excepted.

The record presented an unusual and somewhat ludicrous shifting of positions,—with the defendant insisting that a decree be entered against himself; the complainant resisting a decree in his favor; and the defendant, with no cross-bill filed, excepting to a dismissal. Of course this reversal of position does not change the legal effect of the decree, but it serves to emphasize the fact that it was not a decree against plaintiff on the merits, but one based on McPherson's motion which asserted a contract fixing liability and giving him rights dependent on the ultimate outcome of the investment. The court did not decide what those rights were, nor did it adjudicate that a suit to enforce them could not thereafter be filed. The decree not being on the merits could not be a bar to such subsequent suit in a state or United States court (*Texas Co.* v. *Starnes*, 128 Fed. Rep. 183). The refusal to treat the decree as conclusive of a point which had been left open did not deprive Swift of any Federal right and the judgment of the Supreme Court of South Dakota must be

*Affirmed.*